

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*,

Petitioners,

—v.—

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D., *et al.*,

Cross-Respondents.

BRIEF FOR PETITIONERS

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(*Counsel of Record*)
RACHAEL N. PINE
LYNN M. PALTROW
JOHN A. POWELL
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in failing to hold the Minnesota two-parent notification/judicial bypass statute unconstitutional, despite factual findings that after five years of operation the statute both failed to promote any legitimate state interest and impermissibly burdened minors' privacy rights.
2. Whether the Eighth Circuit erred in holding that the imposition of a mandatory waiting period of not less than forty-eight hours, and commonly seventy-two hours, after notification to both parents, was constitutional.
3. Whether the district court was correct in holding that the two-parent requirement cannot be severed from the remainder of the statute.

PARTIES TO THE PROCEEDING

Petitioners, Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M., individually and on behalf of all other persons similarly situated; Diane P., Sarah L., and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation, were plaintiffs below.¹ Respondents and Cross-Petitioners, the State of Minnesota, Rudy Perpich, as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota, were defendants below.

¹ The caption on the Petition for Certiorari differs from those used in the courts below. The lower courts erroneously failed to use the substituted caption entered by order of the district court on April 3, 1986. This order is reprinted in the Appendix to the Petition for Certiorari at 6a-7a. Citations to the Appendix to the Petition for Certiorari are in the form "___ a." Citations to the Joint Appendix are in the form "J.A. ___." Cites to other parts of the record are by Exhibit (P. Ex. ___) or Transcript (Tr.) page.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court was issued on November 6, 1986. It is reported at 648 F. Supp. 756 (D. Minn. 1986). 10a-52a.

A panel of the Eighth Circuit Court of Appeals issued a decision on August 27, 1987. The decision was set for publication at 827 F.2d 1191 (8th Cir. 1987), 53a-72a, but was subsequently withdrawn by the court. 835 F.2d 1545 (8th Cir. 1987). 158a-159a. See 827 F.2d 1192-1202 (editor's note on withdrawal from bound volume).

The *en banc* opinion of the Eighth Circuit Court of Appeals was issued on August 8, 1988. It is reported at 853 F.2d 1452 (8th Cir. 1988). 74a-109a.

JURISDICTION

Plaintiffs' petition for writ of certiorari was filed on January 4, 1989. Defendant's cross-petition for certiorari was filed on February 4, 1989. The Petition and Cross-Petition were granted on July 3, 1989. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Minnesota Statutes (Minn. Stat.) § 144.343(1)-(7) (1988). 1a-4a.

STATEMENT OF THE CASE

A. History Of The Legislation.

In 1971 the Minnesota legislature enacted the Minors' Consent to Health Services Act, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse. Minn. Stat. § 144.343(1) (1988). 1a. This statute enables adolescents to obtain a wide variety of confidential medical services, including prenatal care, cesarean sections, contraceptives, and penicillin or other treatments for sexually transmitted diseases. Under the Act, the health professional treating the minor is permitted to notify parents only when a failure to do so would jeopardize the minor's health. Minn. Stat. § 144.346 (1988). 5a.

The statute at issue in this case is a 1981 amendment to the Minor's Consent Act that singles out abortion as a service requiring the health care provider to notify both of a minor's biological parents. Minn. Stat. § 144.343(2)-(7) (1988). 1a-4a; 21a. Subdivision 2 of the statute provides that no abortion may

be performed upon an unemancipated² minor until at least forty-eight hours after written notice has been delivered to both parents. 1a-2a.³ There is no exception to the notification requirement for divorced or never-married parents. 21a. Even teenagers who are already mothers or married may find themselves in the anomalous situation of being able to consent to medical treatment for childbirth but not to a confidential abortion. J.A. 230-31. Subdivision 5 subjects anyone performing an abortion in violation of the statute to both criminal penalties and civil liability. 2a-3a.⁴

The statute further provides that if the two-parent notification provision of subdivision 2 is ever judicially enjoined, the statute will then be enforced with a judicial bypass as an alternative to parental notification. 3a-4a. Under the judicial bypass provision, a minor may seek a state court order permitting her to obtain an abortion without notification of both parents if she can convince a judge that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would serve her "best interests." 3a.⁵

² There is no statutory definition of emancipation in Minnesota. See *Streitz v. Streitz*, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985).

³ The statutory exceptions to the two-parent notice requirement are as follows: 1) where the physician certifies the minor's life is endangered such that there is no time for notification, § 144.343(4)(a); 2) where written consent is given by both of her parents, § 144.343(4)(b); and 3) where the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c). 2a.

⁴ Violation of the statute is a misdemeanor and is also the basis for a civil action by a parent wrongfully denied notification. Minn. Stat. § 144.343(5). Conviction of a misdemeanor can be punished by up to 90 days in jail, up to a \$700 fine, or both. Minn. Stat. § 609.02(3) (1988). Violation of the statute may also result in the imposition of discipline upon a physician by the Board of Medical Examiners. Minn. Stat. § 147.091(1)(f) (1988). Such discipline may include censure, reprimand, license suspension, license revocation and imposition of a civil penalty up to \$10,000. Minn. Stat. § 147.141 (1988).

⁵ The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court for the pregnant minor, § 144.343(6)(c)(ii), at 3a, for confidentiality and expedition in processing, § 144.343(6)(c)(iii), at 4a, and for expedited appeal and for access to the trial courts 24 hours a day, seven days a week, § 144.343(6)(c)(iv). 4a.

B. History Of The Litigation.

Plaintiffs⁶ consist of a class of mature minors seeking abortions in Minnesota without the involvement of one or both of their parents, three divorced custodial mothers who support their minor daughters' abortion decisions and fear notice to their ex-husbands, four medical clinics in Minnesota which together perform nearly all the abortions in the state, and two physicians who provide abortion services to minors. Defendants are the State of Minnesota, its Governor, and its Attorney General. 11a-13a.

Plaintiffs challenged the statute on the ground that on its face and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. 13a-14a. On July 31, 1981, a temporary restraining order enjoining subdivision 2, the provision requiring two-parent notice without a bypass, was granted, but section 144.343(2)-(6), establishing two-parent notice with a judicial bypass procedure, was permitted to go into effect on August 1, 1981. 14a. On March 22, 1982, a preliminary injunction was issued as to subdivision 2 but denied as to subdivision 6. 14a. On January 23, 1985, the district court granted defendants' motion for summary judgment on their claim that § 144.343(2)-(6) was constitutional on its face, but denied their claim that the statute was constitutional as applied. *Id.* Trial commenced in February 1986 after two-parent notice with a court bypass had been in effect in Minnesota for four and one-half years.

On November 6, 1986, the district court held that 1) subdivision 2, the notification requirement without bypass, was facially invalid; 2) subdivision 6, the notice/bypass requirement, was invalid to the extent that it requires two-parent notification and a forty-eight-hour waiting period instead of some shorter period; 3) the forty-eight-hour waiting period, but not the two-parent requirement, was severable; and 4) but for this Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the district court would have found the entire statute unconstitutional as applied because it failed to serve,

⁶ Petitioners will be referred to in this section as "plaintiffs" and respondents as "defendants."

and indeed undermined, the state's asserted interests. 32a-51a. The district court enjoined the entire statute because of the non-severability of the two-parent notification requirement. 51a.

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. The panel agreed that compelling notice to both biological parents was "almost always disastrous" to minors and their families, 62a, and that the two-parent notification requirement was not severable from the remainder of the statute. 71a.⁷ The panel specifically held that the two-parent requirement could not be saved by the presence of a judicial bypass system "where, as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision." 68a.

On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by the United States Supreme Court in *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987), and denied rehearing *en banc* as moot. 158a-159a.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in *Zbaraz*, the Eighth Circuit *sua sponte* granted the state's request for *en banc* review and issued its *en banc* opinion on August 8, 1988. 74a. The *en banc* court agreed with the district court and with the panel that Minnesota could not constitutionally require a minor to notify her parents of her intention to have an abortion without providing a judicial bypass option. 80a-81a. Again in agreement with the panel, the court declined to find the district court's factual findings clearly erroneous. 85a. However, the court reversed the panel and district court, holding that the Minnesota notice requirement with a bypass alternative was constitutional and that the "as applied" factual findings were immaterial because the Supreme Court had previously considered such facts in upholding the facial validity of "similar statutes." 85a.

The *en banc* court further held that the district court had erred in finding the two-parent notification requirement uncon-

⁷ The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period.

stitutional in the following respects: 1) the district court had not given enough weight to independent "parental and family interests," 92a-96a; 2) the district court had given too much weight to the forty-two percent of minors who do not live with both biological parents, 91a-95a; and 3) the district court had incorrectly considered the impact of the two-parent notification statute in isolation from the bypass system. 96a. Citing similar reasons, the *en banc* opinion held that the forty-eight-hour delay requirement was not a significant burden. 96a-97a.

The Minnesota statute remains enjoined, however, because the Eighth Circuit granted a stay of the mandate of its *en banc* decision pending review by this Court. 110a-111a.

C. Facts

1. Introduction

This Minnesota criminal statute, requiring notice to both biological parents of minors seeking abortions, was imposed on thousands of pregnant teenagers between August 1, 1981 and November 4, 1986. In 1985 alone, nearly 3500 young women in Minnesota between the ages of fifteen and seventeen became pregnant and, in deciding how to resolve their pregnancies, had to contend with the parental notification law.⁸

This case involved five years of preparation and study, culminating in trial testimony by over fifty-seven witnesses, including single parents, minors, abortion clinic nurses and counselors, nationally renowned physicians, psychologists, psychiatrists, reproductive epidemiologists, seven state court judges who among them had heard nearly all the bypass cases, and many of the guardians *ad litem* and public defenders involved in the judicial bypass procedure.⁹ Though some Minnesota legislators may have originally believed that this law would help minors, the facts presented at trial overwhelmingly demonstrate the opposite to be true. Minnesota's parental notification law

⁸ See Alan Guttmacher Institute, *Teenage Pregnancy in the United States* 24 (Table 8) (1989) (hereinafter "Guttmacher Institute").

⁹ For a description of the qualifications of Plaintiffs' expert witnesses, see Exhibit B in Appendix to this brief.

demonstrably raised the teenage birthrate in Minneapolis; caused there to be more teenage mothers with stunted and dependent lives; added a new generation of unwanted children with their attendant problems; undermined communication and family integrity, particularly in single parent families; and raised the level of physical violence and fear in many families. The law compromised sound medical care by significantly delaying the provision of abortion services to minors, and by increasing the number of teenagers forced to continue an unwanted pregnancy and undergo childbirth. When this law was in effect counselors had to focus on reducing the terror and anxiety of forced notice or the court proceeding rather than on the genuine medical and emotional needs of their teenage clients.

2. The Minnesota Criminal Notification Statute Seriously Harmed Minnesota Teenagers.

a. Privacy Is Critical To Assure That Pregnant Teenagers Seek Necessary Help.

Teenage pregnancy is a disturbing reality in Minnesota and across the nation. Teenage girls do not get pregnant by design; eighty-four percent of the 1.1 million teenage pregnancies in the United States each year are unintended.¹⁰ Furthermore, most teenage girls do not focus on the decision whether or not to bear a child or how childbearing will affect their futures until forced to do so by an unintended pregnancy. When they do find themselves pregnant, forty-two percent of all teenage girls—married or unmarried—nationally,¹¹ and about the same percentage in Minnesota,¹² choose to resolve their unwanted pregnancies through abortion.

¹⁰ Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986).

¹¹ Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plan. Persp. 5, 8 (Table 5) (1987).

¹² Guttmacher Institute, *supra* note 8 at 24 (of the 3470 teenagers between 15 and 17 who became pregnant in Minnesota in 1985, 1490 chose to abort).

The record of this case overwhelmingly demonstrates that concerns about privacy dictate when, how and *if* a pregnant teenager will seek help. The unrebutted evidence adduced at trial reinforces the conclusions of studies of other parts of the nation: without guaranteeing confidentiality, a significant number of minors will not seek pregnancy evaluation, family planning, or abortion services.¹³ Melton Tr. at 1154. Although the majority of teenagers in Minnesota, both before and after this law went into effect, tell at least one parent of their pregnancy, significant numbers go to great lengths to hide it from one or both parents. J.A. 111, 114-16, 137, 461. The result can be death,¹⁴ or serious self-mutilation.¹⁵ The desperation experienced by these young women is illustrated by the fact that one-half of the teenagers obtaining abortions in Minnesota while the law was in effect underwent what was perceived by them as an extreme hardship—the court bypass procedure—in order to avoid mandatory notice to both parents, J.A. 123, 459-61, even

13 See Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126, 137 (1982); Torres, *Does Your Mother Know . . . ?*, 10 Fam. Plan. Persp. 280, 281 (1978); Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288 (1980) [hereinafter Torres & Forrest]; Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25, 26 (1983); Zabin & Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205, 213 (1981); and Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 399-400 (1986).

14 A study of 17 deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that a "desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." One who died was a 15 year-old honor student at a Roman Catholic girls' school. She was found dead in a bathroom of her home, a plastic tube in her vagina. Binkin, Gold & Cates, *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982).

15 Dr. Hodgson testified that one of her patients, a fourteen year old, who tried to keep her pregnancy private had her friends insert a metallic object into her vagina; they tore her "several times." Her cervix was permanently injured. J.A. 462.

though many dreaded the hearing process more than the abortion procedure itself. 20a; J.A. 468.¹⁶ The trial evidence on teenage class members' desperate need for confidentiality as a precondition for seeking help with such sensitive matters as a pregnancy is reinforced by standing legislation in all fifty states, the standards of professional health organizations, and findings by Congress, all of which support the proposition that guarantees of confidentiality are a necessary precondition for minors to avail themselves of certain critical health care services. See discussion *infra*, Point II(B). Indeed, Plaintiffs' counselors and doctors stressed that when a teenage patient came to the clinic with a parent, the minor's medical history had to be taken in the absence of the parent, since teenagers often will not tell the truth about their sexual history, including a previous abortion, with a parent present. J.A. 129, 439-40.

b. Delay Is The Most Significant Risk Factor For Teenagers Who Have Abortions And The Lack Of Abortion Facilities In Minnesota Exacerbates This Risk.

The district court stressed the importance of assessing the impact of the Minnesota statute against the backdrop of pre-existing hardships imposed on women needing abortions in

16 Minnesota is a large state. Many teenagers hitchhiked long distances from home under extreme weather conditions to undergo the judicial bypass procedure and obtain an abortion, coming to Duluth or the Twin Cities from the far corners of the state, northern Michigan, and Canada. J.A. 444; see also Welsh Tr. at 106-08. Lacking other accommodations, it was not uncommon for them to spend the night in the clinic lobby or in a car in the hospital parking lot. J.A. 137. One young woman from a small community with a particularly active anti-abortion constituency turned in desperation to a sympathetic high school counselor who arranged a school outing for her so she would not be missed at school and could spend the day going to court and having an abortion. J.A. 463-64.

Because some minors feared encountering someone at the courthouse who might recognize them, they arranged to come up a back elevator and meet with their attorneys in the bathroom. Welsh Tr. at 119-20. One felt obliged to have her hearing scheduled after regular court hours in order to protect her privacy. *Id.* at 120. Pregnant minors were so afraid of the hearing they turned mute in court, Wendt Tr. at 99, were "wringing wet with perspiration," J.A. 468, and frequently required a sedative. *Id.* Some vomited and one began to abort spontaneously during the court process. 129a.

Minnesota. 14a-16a. Virtually all of Minnesota's abortion providers are located in the two largest metropolitan areas of the state: Duluth and Minneapolis-St. Paul. 15a. Eighty-two out of eighty-seven counties in Minnesota have no readily available abortion provider, 14a, and access to information about abortion services, particularly in rural Minnesota, is limited. 15a.¹⁷ Women often have to travel long distances to obtain abortion services,¹⁸ and this can delay the diagnosis and treatment of pregnancy, increase the cost of obtaining an abortion, and jeopardize their privacy. 15a. These obstacles are reflected in the fact that even before the notification law went into effect, women of all ages obtained abortions later in their pregnancies in Minnesota than in the United States as a whole. 16a; J.A. 106.

Although the medical risks associated with legal abortion are relatively slight, every week of delay in obtaining abortion services increases the risk of complications and death to a statistically significant degree. 20a.¹⁹ Minors, for a number of reasons, are more susceptible to delay than adults²⁰ and tend to obtain later, and therefore more dangerous, abortions. In fact,

17 In all of Minnesota's 87 counties, there are only two hospitals at which a woman can walk in and obtain an abortion. 15a.

18 Plaintiff Women's Health Center is the only abortion provider in Duluth, providing services to women in 24 counties in Minnesota, 14 counties in Wisconsin, four counties in Michigan and Ontario province in Canada. Welsh Tr. at 105-06. When one of its patients is delayed more than 15 or 16 weeks into pregnancy, she has to be sent to one of the two facilities in Minneapolis-St. Paul that is equipped to handle second trimester abortions. 119a; Welsh Tr. at 109.

19 The risk of death increases by 50% each week after the eighth week of pregnancy. J.A. 446. Morbidity also increases by 15-30% each week. Hodgson Tr., Vol. II at 21-22. But the health risks of having an abortion at any time are always less than the risks involved in carrying to term. See note 23, *infra*, p. 11.

20 Teenagers have little experience with the health care system, have few financial resources, and must account for an absence from home, school or work. Wendt Tr. at 24-25. Many teenagers, particularly the very young, fail to recognize early signs of pregnancy because it is common for adolescent girls to experience menstrual irregularities, which may mask initial symptoms of pregnancy. *Id.*

Dr. Willard Cates, former head of the Abortion Surveillance Branch of the United States Centers for Disease Control, has concluded that "delay [in obtaining an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion." P. Ex. 6 at 20.

c. Minnesota's Two-Parent Notification Statute Forced Some Teenagers Into Unwanted Motherhood Which Imperiled Their Health And Stunted Their Futures.

Pregnant teenagers have two options: abortion or continued pregnancy and childbirth.²¹ Abortion is one of the safest surgical procedures doctors perform, and generally safer for teenagers than for adult women.²² Abortion is less risky the earlier in pregnancy it is performed, though at no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery. Hodgson Tr., Vol. I. at 65-66; P. Ex. 4.²³ Furthermore, childbearing for minors is significantly riskier

21 Suicide, tragically, is a third option. Before abortions were legal and accessible to minors under conditions of confidentiality, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant. *McRae v. Califano*, 491 F. Supp. 630, 676 & n.45, 683 (E.D.N.Y.) (citing Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues in Adolescent Psychiatry* 129, 136 (J. Schooler ed. 1973)), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980).

22 After adjusting for the significantly later gestational age at which teenagers' abortions are performed, teenagers have generally lower morbidity and mortality rates from abortion than do adult women. P. Ex. 6 at 21-22.

23 Tietze & Henshaw, *Induced Abortion: A World Review* 1986 4, 110-11 (1986) (hereinafter Tietze & Henshaw). A woman is ten times more likely to die from childbearing than from a legal abortion through the 15th week of pregnancy. P. Ex. 3 at 196. The rate of morbidity related to childbirth is also ten times higher than for abortion through the 15th week. Tietze & Henshaw at 130. From the time abortion was legalized in Minnesota in 1973 through 1984, there were no abortion-related deaths in the state, although during that same time period, 32 women died from pregnancy and childbirth. P. Ex. 93 at 26.

than for adults.²⁴ The Minnesota notification law, in operation, eliminated the less risky option of abortion for a significant number of teenagers.

Dr. Ehlinger, the Director of Personal Health Services for the Minneapolis Department of Health, identified the implementation of the notification law as the most important factor causing an increase in births to fifteen to seventeen year-olds. J.A. 342-343.²⁵ From 1980 to 1984, the birth rate to young women age fifteen to seventeen in Minneapolis went up 38.4%, 136a, compared to only a 0.3% rise in the birth rate to teens age eighteen to nineteen years, 137a, during the same period. Under normal circumstances, these two groups generally share childbirth and abortion trends, J.A. 99-101; the notification law was the only factor that uniquely affected the fifteen to seventeen year-old age group which could explain the difference. J.A. 342-43.

Pregnancy continuation poses not only greater physical risks for teenagers, but greater psychological,²⁶ economic and educa-

24 Maternal mortality (death from pregnancy or childbirth) is 60% higher for women under 15 and 13% higher for women age 15-19 than for women age 20-24. Hodgson Tr., Vol. I at 87; D. Ex. 19 at 42. In females under age 16, continued pregnancy can deplete the nutritional reserves needed for their own growth and place them at a greater risk for other health problems. D. Ex. 19 at 42.

25 A study of the impact of mandatory parental notification corroborates Dr. Ehlinger's conclusion, showing that 23% of teenagers would not seek an abortion at a clinic which required parental notification. The research also indicates that 9% of pregnant teenagers seeking abortions would have an illegal or self-induced abortion if they could not obtain a legal abortion without their parents' knowledge, and an additional 9% would have the baby under those circumstances. Torres & Forrest, *supra* note 13, 12 Fam. Plan. Persp. at 288.

26 There are more adverse psychiatric consequences associated with carrying an unwanted pregnancy to term than with undergoing abortion; because pregnancy is more complicated for a teenager than it is for an adult, termination of an unwanted pregnancy brings even greater relief to a minor. J.A. 458-59; P. Ex. 6 at 22; see also Adler & Dolcini, *Psychological Issues in Abortion for Adolescents in Adolescent Abortion: Psychological and Legal Issues* 90 (G. Melton ed. 1986); American Psychological Association,

tional consequences as well. Teenage motherhood eliminates life choices,²⁷ not only for the teenage mother, but for her children.²⁸

d. Every Option Available To Minors Under The Statute Caused Serious Delay.

The Minnesota notification statute was in effect for five years before it was enjoined. During that time it encumbered thousands of teenagers seeking to resolve their pregnancy dilemmas, no matter what options they ultimately chose or were chosen for them. The statute's primary effect was to impose serious delays on minors, to their great detriment. While the law was in effect, the proportion of minors who obtained second trimester abortions increased dramatically. 135a. In 1978, 18.4% of

Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (Jan. 1987). In *McRae v. Califano*, *supra* n.21, Judge Dooling found that "an unwanted pregnancy can itself be productive of mental derangement." 491 F. Supp. at 675.

The World Health Organization conducted a study of this issue and in 1978 concluded that "[t]here is now a substantial body of data reported from many countries . . . suggesting frequent psychological benefit and low incidence of adverse psychological sequelae" due to abortion. J.A. 374. A study in Hawaii of young pregnant women (15-17) found that the young women who had had abortions, postponed their first birth well beyond the second birth of teenagers who had children, raising the social, educational and economic level of their households. J.A. 373.

27 Dr. Hodgson has had 39 years of clinical obstetrical and gynecological experience treating a patient load which has been about 30% teenagers. She testified, based on her experience, that the psychological trauma of becoming mothers as teenagers is tremendous; their lives can be "literally spoiled" and their education stopped. J.A. 456.

28 Dr. Henry David testified at trial concerning the results of a study that he has been conducting for 20 years of children of women who were denied abortions in Czechoslovakia, a study funded in part by the United States National Institutes of Health. David Tr. at 2525-26. Dr. David has found that children of women denied abortions have social problems which worsen as they get older as compared to a control group of "wanted" children. 138a-140a. They experience more alcoholism, more criminality, and greater difficulty forming close relationships. 139a.

women seventeen and under received second trimester abortions; by 1983, that figure had jumped to 23.0%, 135a, while women in adjacent age groups (18-19, 20-24, and 25+) experienced relatively stable rates for second trimester abortions. For example, in 1978, only 7.8% of women over twenty-five obtained second trimester abortions; between 1978 and 1983, this figure increased only 0.1%. 135a.²⁹

While the statute was in effect, nearly one-half of all the minors seeking abortions chose to go to court. J.A. 123. Judicial bypass delayed minors by an average of two or three days just to get a court appointment, with a total delay of one week or more before their abortions. 20a. The district court found that a one-week delay in obtaining an abortion significantly increased its attendant medical risks, 18a, 20a, 23a, and that such delays were "unavoidable" under the terms of the statute. 18a.³⁰ It further found that the judicial bypass procedure pushed some minors into the second trimester,³¹ a contingency

²⁹ There was additional evidence that the proportion of minors receiving second trimester abortions was increasing: Meadowbrook Women's Clinic reported that as of December 1985, over 30% of their minor patients seeking abortions were in the second trimester. 130a.

³⁰ After minors call a clinic to find out what their options are, those who choose to go to court must call the court and get an appointment. Some counties in Minnesota have no sitting judges willing to hear bypass petitions. 18a-19a. Class members Heather P. and Sharon L. had to wait two weeks and one-and-a-half weeks respectively for abortions because of delays attributable to the bypass system. 115a, 124a.

³¹ The cost of a first trimester abortion averaged \$225 (up to 12 weeks); a delay of even a few days raised this to \$275 (12-14 weeks) for plaintiff minors. 16a. Since post 15-week abortions are not available in Duluth, a delay past that time entailed the additional cost of overnight travel to Minneapolis, where second trimester abortions are performed. 119a. After 21 weeks, plaintiff Meadowbrook Clinic in Minneapolis-St. Paul refers patients to St. Paul-Ramsey Hospital, where a later abortion (22 weeks) costs \$1600-1800, or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs \$2000. These fees, of course, do not include the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the result of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

which the district court found "entails significantly greater costs, inconvenience, and medical risk." 20a.³²

In many cases, minors who sought to invoke the exception to notice due to the death of a biological parent, § 143.343(3), found this process to be a more burdensome alternative than going to court. Because the statute requires written evidence of compliance, 2a-3a, and failure to comply is a criminal violation, clinics required such minors to submit documentation of a parent's death. J.A. 120; Baker Tr. at 475-76. Obtaining death certificates or funeral home receipts resulted in delays,³³ and minors qualifying for the exception focused on the parent's death during their limited counselling time rather than on their more immediate concerns. J.A. 121.³⁴

Minors from broken or dysfunctional homes also met with delays in attempting to comply with the notification law. One minor who sought to notify her natural father suffered a two-week delay because he refused to acknowledge that he was indeed her father. Finally he wrote a letter saying whether he was her father or not he would give permission for the abortion.

³² Plaintiff Cynthia J. could not get an immediate court appointment in her home town. She ultimately had to schedule an appointment in St. Paul, but had to wait almost two weeks because the court clerk was unwilling to schedule an emergency weekend appointment. J.A. 76-79. This delay resulted in a second trimester abortion. J.A. 84. Bonnie L. was unable to schedule an emergency court hearing, resulting in a second trimester abortion. J.A. 93-97. Kathy M. had to wait almost a week for her court appointment and another three days for the judge's decision. J.A. 270-72. Because of the delay, she was unable to appeal the denial, and she had her abortion in another state. J.A. 272-73. One minor was delayed *three weeks* in obtaining an abortion because she could not get a court appointment any sooner than 11 days after she visited the Meadowbrook Clinic. J.A. 138. This minor progressed from 16 to 19 weeks of pregnancy before the abortion could be performed, increasing its cost by \$100. *Id.*

³³ One 15-year-old who lived with her widowed mother had to send to Massachusetts for her father's death certificate, causing a three-week delay. 129a; Welsh Tr. at 219-20.

³⁴ Teenagers who had lost a parent or parents were often traumatized by the resurrection of unpleasant memories as they prepared to have an abortion. J.A. 121. One young woman had to supply the clinic with proof of her father's death, a suicide by gunshot wound to the head, and another, of her mother's murder. *Id.*

J.A. 466. Another minor forced to notify her father experienced delay because of his objections, and the family dispute which ensued culminated in her divorced mother's firing a gun through her father's door. J.A. 128.

Mailed notice, an option chosen by few minors, J.A. 125, Welsh Tr. at 140, also caused lengthy delays. If notice is mailed, constructive delivery occurs at noon on the next regular mailing day. The forty-eight-hour waiting period commences at this point. Consequently, minors in Minnesota who chose to notify their parents by certified letter commonly waited seventy-two hours between initiating the notification process and the abortion itself. 47a; J.A. 126. One pregnant minor who came to the clinic with her mother from some distance and at considerable hardship was forced to wait four days for medical help until notice was delivered to an absent father. J.A. 125. Finally, the district court found that the delays directly attributable to the notification law were compounded by "scheduling factors such as clinic hours,³⁵ transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments." 22a-23a.

3. Those Plaintiff Teenagers Who Seek Confidential Abortions Have Good Reasons For Not Notifying One Or Both Parents Of Their Pregnancies.

The district court found that with or without the parental notification law in Minnesota, the same proportion of minors seeking abortions told one or both of their parents. 41a. Minors who did not want to involve one or both parents, however, had good reasons for acting independently.³⁶ Minor plaintiffs testi-

³⁵ Plaintiff Women's Health Center of Duluth is not open for abortions every day because it has to import out-of-town physicians to perform them. J.A. 442-43; 128a. Thus, mailed notice in Duluth meant that their patients often waited an entire week before the abortion procedure could be performed, even when the minor had one parent's consent. 128a-129a.

³⁶ Judge George Peterson, of Ramsey County Juvenile Court in St. Paul, heard the vast majority of bypass cases in that city. He sent a letter to a Minnesota legislator which stated in part as follows:

(Footnote continued on following page)

fied that their decisions not to tell one or both of their parents of their pregnancy or their intent to abort were due to: the psy-

I have now completed the data gathering and computations you requested on September 20 and to which I referred on September 27. From August 1, 1981 through November 30, 1982, our Court has conducted 258 abortion-consent hearings.

In 80 of those cases, the parents of the girl were divorced. In 35 of those 80 cases, the girl discussed her abortion with her custodial parent but did not wish to notify her non-custodial parent of her desire to have an abortion.

In 20 of the 258 cases, the girl lived with both parents but wished to notify only one of them of her desire to have an abortion.

In another 48 of the 258 cases, the girl discussed the proposed abortion with an adult relative but wished not to notify either parent.

In many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors.

In 8 cases girls were seeking their second abortion.

Two girls already had a child at home.

Fourteen girls were living independently or were in foster homes.

The reasons they give for not wanting to tell one or both parents about the abortion are as follows:

<i>Reason</i>	<i>No.</i>	<i>Pct.</i>
Fear of damaging parent-child relationship:	76	29%
Parents opposed to abortion-have said would kick the girl out:	54	21
Parents opposed to abortion-would force the girl to keep the child:	14	5
Marital, financial or health problems already in home-this would aggravate:	47	18
Absent parent or parents not part of their lives and have no right to know:	35	14
Prior physical abuse feared to reoccur:	11	4
Fear of prior expressed threats:	10	4
One or both parents alcoholic:	9	4
Raped:	2	1
Totals:	258	100%

(Footnote continued on following page)

chiatric or physical illness of a parent;³⁷ chemical abuse and dependency on the part of a parent;³⁸ the anti-abortion stance of a parent;³⁹ the likelihood of a verbally, physically, or sexually abusive response by a parent⁴⁰ or the fact that the minor

As you might imagine, the reasons girls express for wanting an abortion are many and varied. The desire to continue one's education and have a career is expressed in over 95% of the cases. Regardless of hopes and plans for the future, some feel they are simply too young to have a child.

J.A. 380-82.

37 Sharon L. testified that her mother had been hospitalized several times for schizophrenia, a condition that made her moods wildly unpredictable; she feared that telling her mother about her abortion "could have just broken her down emotionally . . . she could have completely slipped out." J.A. 223. Dr. Hodgson testified that often the patients' refusal to communicate about the abortion with an ill or dying parent is "a matter of kindness and love; it's not a matter of being difficult" J.A. 465.

38 Heather P.'s father, an alcoholic who at the time of the abortion had not lived with her in at least eleven years, had frequently hit Heather, her mother and her siblings when he lived with them and had beaten a subsequent wife severely enough that she required hospitalization. J.A. 176. Mary J., whose relationship to her alcoholic mother was "like her babysitter," J.A. 218, was afraid that if she told her mother about her abortion, her mother would resume the self-destructive drinking patterns she was attempting to break and "crumble the bridge" of communication they were trying to build. J.A. 219-20. See also Welsh Tr. at 220.

39 Rather than tell her father, a local politician known to the judge and known to be opposed to abortion, one teenage class member considered suicide or leaving the area. J.A. 64-66. One young woman's father, a doctor, had discussed the issue with her previously and had told her that he "would never allow her to have an abortion." J.A. 115. Wendt testified that another teenager believed that her mother, who opposed abortion for religious reasons, would have forced her to "stay pregnant and raise the child." J.A. 114. See also Welsh Tr. at 226.

40 Natalie C., a minor, testified at trial that she was afraid to notify her parents because she believed her stepfather, who had physically attacked her before, would "knock [her] around." J.A. 66. Kathy M., whose father had threatened in the past to shoot her mother, was so "terrified" of her father's reaction to her decision to abort that had her only option been to tell her father, she would have instead carried the pregnancy to term. J.A. 269-70. Another adolescent believed her father would have hit her if he had been told; when angry he would lean close to her face, "show his teeth" and "get

was not in contact with the parent. J.A. 466. Minors' fears of violence in the family were well-founded.⁴¹

Counselors and court-appointed guardians, judges, and other court personnel, all of whom were experienced in dealing with teenagers, testified at trial that minors are both truthful and accurate in their assessment and description of the family circumstances in which they live.⁴² See, e.g., J.A. 161, 203-04, 232-33; 125a-126a. There was overwhelming testimony that minors tend, if anything, to understate family problems, and are particularly reluctant to reveal matters of family violence and sexual abuse. See, e.g., J.A. 116, 245, 461-62; Widseth Tr. at 21-24. Thus, instead of protecting pregnant teenagers, the notification law mandated parental involvement in situations where minors correctly understood that involvement of their parents would be harmful to their interests.

4. Compelled Parental Involvement Was Devastating To Many Families And Was Especially Disastrous In Single-Parent Homes And Abusive Family Situations.

Experts with extensive clinical experience counseling families and with knowledge of family communication patterns testified

very violent and physical." J.A. 225-26. Ida B., the older sister of a teenaged class member, testified that she helped her younger sister through the court procedure because 20 years earlier, their father had reacted violently to Ida B.'s pregnancy, which caused Ida to marry at age 16. Ida B. Tr. at 1440-42. P.C., a minor, was forced to notify her natural mother and father—or go through the bypass procedure—even though she had been removed from her natural mother's home for sexual abuse, physical abuse and neglect, and there was a pre-existing court order forbidding her natural mother from seeing her daughter. Welsh Tr. at 154-55.

41 Extensive studies of family violence concluded that one of the specific times when violence is greatest is during pregnancy. Walker Tr. at 308-09.

42 Judge Martin testified that family violence is the "most common" reason that a minor refuses to notify one or both of her parents. He cited a case in which "the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy." Similarly, a week or two before the trial, Judge Martin heard a case in which "the father had broken the petitioner's mothers [sic] wrist and had frequently abused both the mother and the petitioner." J.A. 204.

at trial that while family relationships generally benefit from voluntary and open communication, the effect of compelling communication within families is unpredictable and frequently disastrous. 21a-22a, 30a-31a; J.A. 132, 198; Benedek Tr. at 910-11, 993. Neither accidental nor coerced communication of personal information is based upon trust or the voluntary desire to share or to know, which are the hallmarks of productive communication patterns in a functional family. Benedek Tr. at 906, 930-31.

Under circumstances where trust is lacking or parents are unable to react reasonably to the news of a daughter's pregnancy, maintaining secrecy might be the most mature response on her part, as well as the one most likely to preserve and protect family relationships. Benedek Tr. at 906-09.⁴³ A decision not to reveal the fact of the pregnancy or abortion may avert "reintroduc[ing] [a] parent's disruptive or unhelpful participation into the family," 22a, a rupture or polarization of the marital relationship,⁴⁴ or intra-familial violence.

Indeed, the trial court found that the law did not promote, and in some cases actually inhibited, voluntarily initiated intra-family communication. 31a, 46a-47a.⁴⁵ Specifically, the court found that a sizable proportion of minors seeking abortions in Minnesota voluntarily notified at least one parent before the statute was enacted, and that there was no evidence this percentage had changed as a result of the statute's enactment.

43 Following notification that their teenage daughter is pregnant, some parents refuse to speak to her. P. Ex. 103 at 9, 12, 13 (deposition of Florence K.). Plaintiff Florence K. testified that when her father found out about her pregnancy despite her efforts to keep it from him, she and her father "didn't talk for like two or three months afterwards." P. Ex. 103 at 9.

44 Notification has also resulted in marital discord and divorce. J.A. 298.

45 Suzanne Smith, supervisor of the guardian *ad litem* program in Hennepin County, testified that some minors who would have considered telling one parent told neither because they were "absolutely sure" one parent could not be told and "they had to go to court anyway." J.A. 239.

41a.⁴⁶ It further found that some minors who ordinarily would have told one parent were "dissuaded" from doing so since they had to go to court anyway to avoid notification of the other. 31a. The Eighth Circuit panel agreed with the district court's assessment of the law's negative implications for intra-family communication: "[A]lthough family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect. It is almost always disastrous." 62a.

The district court found that compelling notification to both parents when they are divorced or separated could be especially harmful to the young woman's welfare. 30a-31a.⁴⁷ Even where the minor resides in a functional family, a non-custodial par-

46 The *en banc* court erroneously stated that under the statute parental notification had increased. 83a n. 9. This statement is not supported by the evidence and it contradicts the trial court's specific finding that no witness testified that the proportion of minors notifying their parents had changed after the statute was enacted, 41a, and that defendants failed to establish that the statute promotes either parent-child communications or the other values which it sought to promote. 29a. The evidence shows that prior to enactment of the statute "better than half" of the minors choosing abortion fully involved their parents in making their decision. Webber Tr. at 610-11; Tr. at 1586. The evidence further shows that while the statute was in effect, about half of the minors followed the judicial bypass and about half notified their parents. Hunter Tr. at 789-90; Welsh Tr. at 135. Thus, no change occurred under the statute. 41a. The trial court based its finding on the substantial evidence in the record that the statute had failed to promote family integrity or communication, 26a-27a, and the absence of contrary testimony. 41a. To the extent the *en banc* court thought there was evidence to support its contrary conclusion, it misread an ambiguous portion of the trial record, see J.A. 125-26, and had no basis to find the trial court's contrary interpretation of that testimony clearly erroneous. 41a. Further, as the *en banc* court itself noted, the defendants never contended that the incidents of parental notification had increased under the statute. 83a n. 9.

47 The district court found that "[r]ational statistics reveal that approximately [50%] of all marriages end in divorce. There [was] no testimony [at trial] indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study that found that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents." 29a.

ent's sudden involvement can be disruptive to the household; in abusive or otherwise dysfunctional families, compelled notification was especially dangerous because it could provoke violent and abusive reactions. The district court found that a large percentage of families in Minnesota in particular, and the United States in general, are dysfunctional. Reports indicate that there are an average of 31,200 reported assaults on women by their partners each year in Minnesota alone, and that family violence occurs in at least two million families across the United States. 30-31a; J.A. 128.⁴⁸ Dr. Lenore Walker, a clinical psychologist and national expert on family violence, testified that there was a consensus among researchers of abusive and dysfunctional families that family violence is at its height during a family member's pregnancy, immediately following childbirth, and during children's adolescence. Walker Tr. at 296; J.A. 193-94. She testified that pregnancy triggers violent reactions in abusive dysfunctional families "like showing a red cape to a bull." J.A. 194.

The trial court found no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification. Instead, minors were often further alienated from their non-custodial parents as a result of the process. 30a. Moreover, the court found that "[t]he non-custodial parent often will reintegrate with the family in a disruptive manner." *Id.* The vast majority of voluntarily informed parents appearing in court with their daughters were divorced women, such as plaintiffs Diane P. and Sarah L., who had not seen their ex-husbands in years. 31a. The evidence showed that compelling young women either to notify a disinterested or abusive non-custodial parent or to seek court authorization not to do so was traumatic, burdensome, interfered with voluntarily initiated parent-child communication, and infringed upon the

48 Even these numbers substantially underestimate the problem because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to report violence or abuse. 30a. Whatever the actual numbers, the court found that "[m]any minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence." *Id.*

privacy of both mother and daughter. 31a, 46a-47a; *see also* 21a-22a.⁴⁹ Notice to an abusive father could be threatening to the mother of the minor as well as to the minor herself. J.A. 131-32, 166-67, 194. The district court concluded that a "regulation requiring notification of both parents when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors." 46a.

In considering the impact of the law as a whole on families with pregnant minors, the court found that "[f]ive weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) . . . furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity," 29a, 41a, and that the statute had failed to improve family relations "more than it undermine[d] them." 29a.

5. The Judicial Bypass Was Not An Option For Many Teenagers Who Needed Confidential Abortions And The Statutory Exceptions Did Not Work.

In practice, the court bypass procedure was not available to many teenagers who sought abortions during the time the statute was in effect. 18a-19a. The trial court found that teenagers who were able to utilize the procedure were almost inevitably either mature or "best interest" minors. 27a.⁵⁰ The court also found that the bypass process was sufficiently daunting that some mature minors and some best interest minors could not avail themselves of the alternative procedure. 20a. Eighty-nine percent of all the minors who went to court in Minnesota were either sixteen or seventeen years old. J.A. 160. The testimony of the state court judges was that "[t]hey were typically middle to

49 For example, Jackie H., one of the three named single mother plaintiffs, testified at trial that while at state court with her daughter seeking an order under this statute, she was forced to reveal, in front of her daughter, that she had divorced her husband on account of his physical abusiveness. 117a-118a.

50 Except for a few anomalous situations, all minors who went through the bypass procedure were adjudged mature or best interests. 23a-24a.

upper-middle-class kids . . . the vast majority of them in school [with] . . . plans for the future. Typically they were white." J.A. 157, 184-85, 187.

Hardly any of the members of the plaintiff class of minors had ever been to court before their bypass hearings. The process involved revealing their personal histories to several strangers and encountering numerous other personnel in the courthouse who learned at least their first name and why they were there.⁵¹ Upon a review of extensive testimony by witnesses involved in each aspect of implementation of the bypass procedure,⁵² the district court concluded:

[M]any minors resent having to reveal intimate details of their personal and family lives to these strangers [and] are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy.

20a. Minors who were able, nonetheless, to avail themselves of the court bypass procedure testified uniformly that they found the court procedure anxiety-provoking.⁵³

51 These strangers included the other teenagers waiting for the bypass hearings, parents and boyfriends of other minors, secretaries, receptionists, court clerks, court reporters, the guardian *ad litem*, the public defender, the judge, and the judge's law clerk. J.A. 157, 184, 206; Honkala Tr. at 523, 526; Widseth Tr. at 35-38.

52 The public defenders, guardians *ad litem*, clinic personnel, and state judges uniformly testified at trial that court was a frightening, nerve-racking, and traumatic experience for these young women. The director of the guardian *ad litem* program in Hennepin County, who supervised or saw 2264 minors go through the bypass procedure, testified that the teenagers were "very nervous, very scared. Some of them are terrified . . . They are often exhausted" and "feel like a criminal." J.A. 234. Judge Sweeney, who adjudicated minors' petitions under the law, testified at trial that the level of apprehension that minors experienced was tremendous. "[O]ne young lady had her—her hands were turning blue and it was warm in my office" 26a; Sweeney Tr. at 1039.

53 Plaintiff Clara Z. described the experience as follows: "[E]verybody is pointing their finger at you saying you have done bad. It's scary [sic]." P. Ex. 95 at 10. Rose C., another class member, said "[I]t almost made you feel that you were doing something really wrong" P. Ex. 98 at 23.

The district court found that the exception in the statute exempting abused teenagers did not work because a precondition was that such abuse be "reported." 21a.

Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities [as this exception requires the clinics to do] creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

Id. Dr. Walker, an expert on such abusive or dysfunctional families, testified that it would be exceptionally difficult for minors in such families to choose and carry out the bypass procedure because the "rules of those families are secrecy Going to court would be an exposure of a risk [of more abuse] and it would be very difficult for a minor to do that." J.A. 196.

As is apparent from the foregoing discussion, the district court did not decide this case based upon hypotheses or abstract theories about what a parental notification statute could or could not accomplish. More than five weeks of trial and testimony from fifty-seven witnesses, a large number of whom had significant contact with the statute in actual operation during the preceding four-and-a-half years, created a panoramic factual setting in which the issues of this case were decided by the district court. Now this Court has the unique opportunity to consider these issues against a fully developed factual record.

SUMMARY OF ARGUMENT

Laws which impinge upon the right of a minor to choose to terminate a pregnancy are valid only where narrowly drawn to serve the state's interest in protecting immature minors. Such laws must be drafted with particular sensitivity to the privacy rights of minors.

Minnesota's two-parent notice statute is unconstitutional under these standards. No case previously addressing the constitutionality of a two-parent parental involvement law sustained such a law without exception for minors living in one- or no-parent households. See *H.L. v. Matheson*, 450 U.S. 398, 413 (1981); *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (plurality) [hereinafter *Bellotti II*]. Further, no prior case sustaining the facial constitutionality of either a one- or two-parent notice or consent requirement, did so in the presence of a comprehensive record of the actual impact of the law in operation. See, e.g., *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. at 491-92.

The Eighth Circuit erred in sustaining the challenged statute "as a matter of law" and in failing to assess whether the law impermissibly burdened minors' constitutional rights, actually served the state's interests, or proved in fact to be narrowly tailored to promote the legitimate interests the state sought to promote. In failing to review the constitutionality of Minnesota's law in operation, the Court abdicated its judicial duty under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), and rendered factual assumptions irrefutable.

Had the Eighth Circuit examined the evidence, it would have concluded, as the district court did, that Minnesota failed to prove Minn. Stat. § 144.343 (2)-(7) was narrowly drawn or actually served the state's purported interest in protecting pregnant minors, promoting parent-child communication, and improving family relations in any meaningful way. The Eighth Circuit's view that any unconstitutional burdens imposed by the statute are negated by the existence of a statutory judicial bypass mechanism is erroneous. This Court never intended the bypass to be an all-purpose cure for the improper infringement of minors' rights, but rather a means of determining which minors may be subjected to the inherent burdens of an otherwise constitutional notice requirement. The Eighth Circuit further erred in holding that the two-parent notice requirement was justified by unarticulated, independent rights and interests of biological parents. This Court has never treated any such

rights and interests as equal to or paramount over the fundamental privacy rights of minors.

Courts have uniformly struck down waiting periods of fixed duration before an abortion could be performed. Thus, the Eighth Circuit erred in upholding Minnesota's waiting period of forty-eight (and commonly seventy-two) hours after notification has been mailed to both parents. Finally, the Minnesota legislature deliberately chose to enact a statutory scheme which mandated notification to both biological parents. This scheme cannot be revised without eviscerating the intent of the law. Therefore, the two-parent requirement cannot be severed and the entire statute must fall.

ARGUMENT

I. MINNESOTA'S TWO-PARENT NOTIFICATION AND JUDICIAL BYPASS STATUTE IS UNCONSTITUTIONAL.

Minnesota requires a minor seeking an abortion to notify both biological parents. The statute provides no exception for minors whose parents are divorced, separated, never married, or for minors who have never even met their absent parents. Minn. Stat. § 144.343 (3),(4); Exhibit G. As such, it is one of the most restrictive laws of its type in the country. The disastrous impact of this law on the health and lives of the plaintiff class is undisputed.

This Court has repeatedly recognized that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (citations omitted); see also *Bellotti II*, 443 U.S. at 633, and cases cited therein; *In re Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). In particular, minors are guaranteed the constitutional right to choose abortion for "there are few situations in which denying a minor the right to

make [such] an important decision will have consequences so grave and indelible." *Bellotti II*, 443 U.S. at 642.⁵⁴

No prior decision of this Court has addressed or sustained the constitutionality of a two-parent involvement requirement as drastically out-of-step with the reality of family life across this nation as Minnesota's.⁵⁵ Although this Court has held that abortion restrictions on minors' abortion rights may be justified by some "significant" state interests other than the compelling interests necessary to sustain restrictions on the abortion rights of adult women, "[t]he need to preserve [this] constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 642. Statutes such as the notification law at issue here are permissible only if they are narrowly tailored to serve the "State's interest in protecting immature minors."⁵⁶ *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. at 490-91 (Powell, J.); see *H.L. v. Matheson*, 450 U.S. at 413 (such laws must "plainly serve[] important state interests [and be] narrowly drawn to

54 As this Court added "[T]he potentially severe detriment facing a pregnant woman, . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." *Bellotti II*, 443 U.S. at 642.

55 Indeed, this Court has properly confined its opinions concerning the facial constitutionality of statutes requiring the involvement of both parents to situations in which "the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649; see also *H.L. v. Matheson*, 450 U.S. at 407 (holding limited to minor "(a) . . . living with and dependent upon her parents, (b) . . . not emancipated by marriage or otherwise, and (c) . . . [who has] made no claim or showing as to her maturity or as to her relations with her parents"). The two other cases concerning minors and abortion previously decided by this Court involved statutes requiring the consent of only one parent. See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439 (1983); *Ashcroft*, 462 U.S. at 479 n. 4. See also 46a.

56 The burden is on the state to show that its law restricting a minor's rights satisfies these stringent standards. See *Danforth*, 428 U.S. at 75; *Matheson*, 450 U.S. at 413; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) (plurality); *id.* at 702-03 (White, J., concurring).

protect only those interests"); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987).⁵⁷ Minnesota's law is unconstitutional under these standards.

A. The Effect Of Minn. Stat. § 144.343(2)-(6) In Operation Is Central To The Constitutional Analysis.

Minnesota's two-parent notice and judicial bypass law operated in full force for five years before it was enjoined following trial. 56a; 81a. The district court's conclusions were based on a unique and comprehensive record of the law in operation.⁵⁸ In the presence of such a record, the traditional distinction between "facial" and "as applied" analysis breaks down. The constitutionality of Minnesota's law depends, therefore, on an examination of the Minnesota experience and the trial record.

Despite the fact that this Court has never addressed the issue presented in this case, the Eighth Circuit found two-parent notification to be constitutional "as a matter of law." 85a. Yet the question of whether a statute actually burdens plaintiffs, see *Storer v. Brown*, 415 U.S. 724, 740 (1974), or serves the state's interests, see *Plyler v. Doe*, 457 U.S. 202, 228 (1982), *Horton v. Marshall Pub. Schools*, 769 F.2d 1323, 1330 (8th Cir. 1985), has always been considered one of fact. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986), *cert. denied sub nom. Piscataway Township v. New Jer-*

57 States must thus allow mature minors and those whose best interests require confidentiality to choose an abortion without parental involvement. See *Akron*, 462 U.S. at 428 n.10 (1983); *Bellotti II*, 443 U.S. at 643-44; *Danforth*, 428 U.S. at 75. It is for this reason that the Court has required the sort of judicial bypass procedure provided by § 144.343(6) of Minnesota's statute. *Bellotti II*, 443 U.S. at 643-44; see also *Ashcroft*, 462 U.S. at 491 (quoting *Akron*, 462 U.S. at 439-40).

58 The district court made detailed findings of fact based on testimony by witnesses with first-hand knowledge of nearly 100% of the minors who were affected by the statute. For example, the state court judges who testified at trial collectively saw 90% of the minors who invoked the bypass, 25a, and the testimony of clinic personnel was drawn from experience with nearly every one of these minors. 26a.

sey Citizen Action, 479 U.S. 1103 (1987). See also Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 84.⁵⁹

Even the legitimacy of the state's interests cannot be sustained based on "archaic and overbroad generalizations" unsupported by evidence of any kind. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982); see *Carey v. Population Servs. Int'l*, 431 U.S. at 696 (plurality) ("attempt to justify . . . burden [on rights] . . . requires more than a bare assertion, based on a conceded complete absence of supporting evidence"); see also *Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978); *Craig v. Boren*, 429 U.S. 190, 200-02 (1976). Consequently, "[n]either sentiment nor folklore . . . [have] cause[d this Court] to shut [its] eyes" to the truth. *In re Gault*, 387 U.S. at 21-22. See also 36a.⁶⁰

Because application of these constitutional standards requires knowledge of the facts, this Court has never precluded a full review of the facts when assessing statutes challenged as

59 Indeed, commentators have noted that the "principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted." Karst, 1960 Sup. Ct. Rev. at 76-77 & n. 8 (citing Hart & Wechsler, *The Federal Courts and the Federal System* 77-79, 93 (1953)). See generally Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 658-68 (1988), and commentators cited therein; Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6, 19 (1924) (legislative findings cannot bind courts "since this would furnish a simple means of preventing judicial review of . . . legislation").

60 This Court has emphasized the importance of a full factual record to the adjudication of constitutional claims. See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945). Cf. *Vasquez v. Hillery*, 474 U.S. 254, 257-60 (1986). Indeed, the Court has often refused to decide constitutional questions in the absence of a sufficient factual record. See, e.g., *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1397 (1989) (record inadequate to decide issue).

applied. For example, in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), this Court concluded that a federal statute did not violate the Establishment Clause on its face, *id.* at 2579, but remanded to the district court "for consideration of the evidence . . . insofar as it sheds light on the manner in which the statute is presently being administered." *Id.* at 2580. See also *id.* at 2581 (O'Connor, J., concurring). Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court sustained an election financing law but noted that facial validity of the law would not preclude a future finding of unconstitutionality based on "factual proof" that the law discriminated against "minor" political parties in operation. *Id.* at 97 n. 131; see also *Storer*, 415 U.S. at 740; *Seagram & Sons v. Hostetter*, 384 U.S. 35, 52 (1966); *McAdory*, 325 U.S. at 461-62; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

Nowhere did the Eighth Circuit explain why it exempted this statute from these black letter principles. While the Eighth Circuit properly "recognize[d] that a statute may be facially valid, yet upon full development of a factual record be considered unconstitutional in operation," 85a (footnote omitted), it summarily failed to review Minnesota's statute as applied, concluding "that approval given to similar statutory [parental involvement] plans mandates approval in this case." *Id.* In so holding, the court of appeals ignored any distinction between "facial" and "as applied" cases and confused this Court's holding in *Ashcroft* with a proposition far broader than the case entailed.

Ashcroft neither resolved the facial constitutionality of a two-parent notice law, see discussion *supra*, n.55, nor addressed the constitutionality of such laws in operation. See 462 U.S. at 491-92. A single narrow question was before the Court: Whether the court of appeals had erred in its "interpretation" of the "plain language of [the challenged] statute." *Planned Parenthood Ass'n v. Ashcroft*, 50 U.S.L.W. 3928 (U.S. May 25, 1982) (No. 81-1255) (question presented). No previous decision by this Court reviewed a parental involvement

statute in operation.⁶¹ "Indeed, in [those] . . . case[s], it was clear that only a facial challenge could have been considered, as the Act[s in question] had not been implemented." *Kendrick*, 108 S. Ct. at 2569; *Seagram*, 384 U.S. at 41. Evidence regarding the real operation and impact of the law was simply unavailable. See *Bellotti II*, 443 U.S. at 656 & n.4 (Stevens, J., concurring).⁶²

In treating the constitutionality of Minn. Stat. § 144.343(2)-(6) as a pure "matter of law," 85a, the Eighth Circuit treated some factual assumptions as irrefutable.⁶³ These assumptions include (1) that the state's asserted interests in family integrity and promoting the health and decision-making of immature minors are actually served rather than undermined by Minnesota's two-parent notice/bypass statute, 86a; (2) that there is no significant difference in interference between one-parent and two-parent involvement, 89a-90a; (3) that the degree of burden from a notice/bypass scheme is determinate and fixed by law, 86a; (4) that the degree of burden of a mandatory notice statute is less than that of a consent statute, 94a; (5) that every state's

61 The statute in *Bellotti II* was judicially restrained before the statute's effective date and "never [was] . . . enforced by Massachusetts." 443 U.S. at 625 n.1. The statute at issue in *Ashcroft* was similarly enjoined before it went into effect. See *Planned Parenthood Ass'n v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980). In *Matheson*, 450 U.S. at 401, the only facts before the Court were those regarding a single named appellant, and the Opinion of the Court "primar[il]y" addressed appellant's standing to challenge the statute as applied to mature minors. See *Akron*, 462 U.S. at 440 n.30. As the district court below itself noted, "it [was] the first ever to examine a parental notification or consent substitute statute in actual operation." 39a.

62 Justice Stevens, in fact, predicted that the constitutional questions presented in *Bellotti II* would "appear quite different" in the presence of a factual record revealing the real impact of an operating bypass law. 433 U.S. at 656 n.4.

63 In facial constitutional analysis, courts generally construe a statute to be valid where possible. See, e.g., *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988); *INS v. Chadha*, 462 U.S. 919, 944 (1983). Where a statute is challenged as applied or in operation, however, the actual facts are of increased importance to the analysis and courts are more loathe to rest constitutional determination on assumptions of fact. Cf. *Kendrick*, 108 S. Ct. at 2580.

judicial bypass procedure, no matter how it is designed, provides a viable alternative for minors who need to utilize the procedure, 90a; and (6) that the promotion of biological parental authority will strengthen family integrity. 94a-95a.

To uphold Minnesota's law based on such factual assumptions disregards the district court's findings,⁶⁴ effectively freezes the premises of past decisions into constitutional law, see *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring), and abdicates the "very essence of judicial duty." See *Marbury v. Madison*, 5 U.S. at 178.

B. The Minnesota Two-Parent Notice/Bypass Law Impermissibly Burdened Minors' Privacy Rights.

Minnesota's statute failed to achieve the state interests and burdened minors and their families in a multitude of ways neither intended by the legislature nor permitted by the Constitution. In seeking, in part, to protect a hypothetical class of immature minors whose best interests require parental involvement, Minnesota's statute sweeps broadly and blindly without the sensitivity the Constitution requires.⁶⁵

"[T]he lines drawn in a state[s] regulation [of abortion] must be reasonable." *Akron*, 462 U.S. at 438; *Matheson*, 450 U.S. at 413. There must be a " 'fit between the legislature's end and the means chosen to accomplish those ends,' . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . a means narrowly tailored to achieve the desired objective." *Bd. of Trustees of the State Univ. of New York v. Fox*, 109 S. Ct. 3028, 3035 (1989) (citations and quotations omitted). Minnesota's "regulation requiring notification of both parents even when the nuclear family

64 Many of the assumptions made by the *en banc* court directly conflicted with those found by the district court. See Statement of Facts *supra*; see discussion *infra*. The Eighth Circuit, however, failed to address whether the trial court's findings were "clearly erroneous" upon examination of the record. See Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-75 (1985).

65 These immature, non-best-interests minors are precisely the minors the statute failed to serve. 27a-28a.

unit has either broken apart or never formed is not reasonably designed to further the state's interest in protecting minors." 46a.

Minnesota's law in operation failed to provide all mature and best interests minors with a real alternative to parental involvement. Facts, *supra*, at § 5. Some carried unwanted pregnancies to term and others travelled out of state. 20a. Mature and best interest minors who did utilize the bypass were able to avoid destructive parental involvement, but were delayed, frightened and compelled to disclose the most intimate family matters to an array of public employees. Facts, *supra*, at § 5. Immature and non-best-interests minors carried to term rather than notifying their parents. 27a. Minors who voluntarily involved one parent were nevertheless compelled to obtain judicial approval for the decision not to involve a violent, terminally ill, or psychologically disturbed parent. Facts, *supra*, at § 3. Many of the fifty percent of Minnesota minors living in one- or no-parent households were compelled to involve a non-custodial or absent biological parent with whom they had no communication, trust or relationship. Facts, *supra*, at § 4. These minors frequently went to court with single parents, usually mothers with custody, who were divorced, battered, or remarried, to obtain the approval of a juvenile court judge and avoid reinvolving the second biological parent in their lives. 31a. These single mothers were forced to disclose stories about their divorces. 117a-118a.

The Minnesota legislature may indeed have intended to exempt certain minors from the burdens of both compelled notice and the judicial bypass procedure; the record demonstrated, however, that this effort also failed. While the statute purports to apply only to "unemancipated" minors, Minn. Stat. § 144.343(2), at 1a, the absence of a statutory definition of emancipation meant that minors had to go to court to be declared eligible for this exemption. See *Streitz v. Streitz*, 363 N.W.2d at 137;⁶⁶ P. Ex. 13 and 14. Similarly, minors with a deceased biological parent, while also ostensibly exempt, Minn. Stat. § 144.343(3), at 2a, were asked by providers to give writ-

⁶⁶ Minors who were mothers, married, or living independently from their parents generally had to go to court. J.A. 230-31.

ten proof of the parent's death. Facts, *supra*, at § 2(d).⁶⁷ This severely upset members of plaintiff class such as G.K., and delayed their abortions. *Id.* Finally, while the legislature may have hoped to avoid imposing further burdens on minors who were already victims of sexual or physical abuse, this effort, too, was unsuccessful. Most of these minors did not reveal that they were abused, 21a, but even those who did could not both be exempt from the statute and retain their privacy because the statute requires that abuse be reported to state authorities, Minn. Stat. § 144.343(4)(c), at 2a, thus creating a substantial risk of disclosure. 21a.

Compounding the statute's far-flung burdens was its utter failure, as the district court found,⁶⁸ to achieve any of the state's legitimate aims more than it undermined them. 29a.⁶⁹ Minnesota sought to protect the health and welfare of its teenagers. Yet the statute drove them from health care, Facts, *supra*, at § 2(a), interfered with the care they obtained, 20a, and gave many no choice but unwanted motherhood. Facts, *supra*, at § 2(c). Minnesota also sought to foster communication between minors and their parents regarding their abortion choice. Yet five weeks of trial revealed no proof that communi-

⁶⁷ This is because subd. 5 of the statute requires written proof of compliance. 2a-3a.

⁶⁸ The district court found that Minnesota did have one purpose, "to deter and dissuade minors from choosing to terminate their pregnancies," 25a, which may have been achieved. But since this purpose is not legitimate, see *Thornburgh*, 476 U.S. at 759, the fact that it was achieved, see Facts, *supra*, at § 2(c), argues against the constitutionality of the statute.

⁶⁹ The district court said:

The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

cation had, in fact, increased. 41a. Moreover, the requirement that both parents be notified actually decreased the voluntary communication between some minors and their single parents. 22a. Finally, Minnesota had hoped to improve family integrity by mandating the involvement of both parents in the minor's decision. Yet in doing so, Minnesota imposed a rigid, idealized definition of family on the varied and too often dysfunctional family circumstances in which a majority of its teenaged citizens live. 29a-30a.⁷⁰

The Eighth Circuit's response to these facts was to assert baldly that an "undue burden" on one group of minors—no matter how large—does not "render the statute unconstitutional for all." 95a. In so holding, it relied heavily on its erroneous view of the bypass option as a panacea for the statute's unconstitutional ills.

C. The Presence Of A Judicial Bypass Procedure Does Not Immunize All Underlying Statutory Requirements From Constitutional Scrutiny.

The Eighth Circuit made a fundamental error when it held, without reference to the record or to the trial court's findings, that "[a]ny added burden the two-parent notification require-

⁷⁰ Courts in Minnesota themselves recognize that family structure and good communication cannot be created by judicial fiat. For example, in *Chapman v. Chapman*, 352 N.W.2d 437 (Minn. Ct. App. 1984), the Minnesota court of appeals reversed the trial court's award of joint custody, because "[a]lthough ideally the parents should make major decisions concerning their children jointly, joint legal custody should not be used as a 'legal baseball bat' to coerce cooperation" between parents who cannot "cooperate and amicably settle disputes about the children." *Id.* at 441. Minnesota law also recognizes that disputes between parents can "endanger[] the children's emotional well-being by placing them in the middle of a 'tug-of-war.'" *Andros v. Andros*, 396 N.W.2d 917, 922 (Minn. Ct. App. 1986). See also *Tollefson v. Tollefson*, 403 N.W.2d 857, 859-60 (Minn. Ct. App. 1987); *Heard v. Heard*, 353 N.W.2d 157, 161-62 (Minn. Ct. App. 1984); *Andersen v. Andersen*, 360 N.W.2d 644, 646 (Minn. Ct. App. 1985); *Bateman v. Bateman*, 382 N.W.2d 240, 250 (Minn. Ct. App. 1986); *Wolter v. Wolter*, 382 N.W.2d 896, 898-99 (Minn. Ct. App. 1986); *Tuma v. Tuma*, 389 N.W.2d 529, 531 (Minn. Ct. App. 1986); *Estby v. Estby*, 371 N.W.2d 647, 649 (Minn. Ct. App. 1985).

ment imposes in individual cases is negated by the judicial bypass mechanism" 93a. The statement reflected the court's unwillingness to assess the constitutionality of Minnesota's two-parent notice requirement in operation.⁷¹

This analysis flies in the face of prior decisions of this Court. Even with the limited facts then available, see discussion in Point I(A) *supra*, this Court in *Bellotti II* carefully analyzed the state's interests and whether the proposed statute was narrowly drawn to serve them. See *Bellotti II*, 443 U.S. at 644-50. A judicial bypass procedure was suggested by this Court in *Bellotti II* "not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests would not be served by making the abortion decision without parental involvement." 102a (Lay, C.J., dissenting).

The circuit court's formulation of the bypass as an "all-purpose cure" would not only impose unconstitutional burdens on teenagers in Minnesota under this law, but could have further absurd and draconian consequences. States could require teenagers to notify the putative father of the minor's child (with or without exception for rape or incest), his parents⁷² or any and all adults claiming an interest in the minor's health and welfare, such as grandparents, school officials or friends. Indeed, conditions other than notification, such as mandatory religious classes on when life begins, could be imposed.

In sum, the circuit court's analysis would drown minor's privacy rights in a hoard of regulatory measures bearing no compelling, significant or reasonable connection to the state's

⁷¹ Referring to the district court's conclusion that the two-parent requirement was unconstitutional and not severable from the remainder of the statute, the Eighth Circuit stated: "We confess some confusion as to why the district court examined the two-parent notice and the 48-hour delay requirements in isolation and applied its conclusions to invalidate the entire statutory procedure it had just approved." 92a.

⁷² Indeed, one early draft of Minn. Stat. § 144.343(2)-(6) proposed that both parents of the putative father be notified in addition to the pregnant minor's own biological parents. See Exhibit G (excerpts from Minnesota Legislative Journal).

legitimate interests. These requirements would be imposed on all minors, and for two classes of minors, they would be unavoidable: immature, non-best interest minors, and minors who are unable to navigate the judicial system. See Facts, *supra*, § 5. Minors, like the majority of plaintiff class members, who voluntarily confide in one or both parents, would be forced to go to court to bypass additional senseless conditions. The bypass mechanism would become a "super review board" for the abortion decision of nearly every minor who does not flee the state or carry her unwanted pregnancy to term.⁷³ See generally 104a (Lay, C.J., dissenting).

For these reasons, and because the bypass procedure together with the two-parent requirement operated to impose devastating burdens on minors, see Facts, *supra*, § 4 and Point I(B) *supra*,⁷⁴ the Eighth Circuit erred in upholding the constitutionality of Minnesota's two-parent notification requirement.

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE INDEPENDENT RIGHTS AND INTERESTS OF BIOLOGICAL PARENTS JUSTIFY MINNESOTA'S TWO-PARENT NOTIFICATION REQUIREMENT.

After noting the substantial burdens which the district court found to have been imposed by the statute on the forty-two percent of Minnesota minors living in one- or no-parent households, 91a-92a, the Eighth Circuit nevertheless concluded that "the principles enunciated by the Supreme Court as to the parental role . . . apply to non-custodial parents as well as custodial parents," 95a, and "to both no-parent and one-parent households" 92a. In thus equating the interests of non-custodial parents with those of custodial parents and in elevat-

⁷³ Such review boards have been rejected by this Court. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973). See also *Morgentaler v. The Queen*, 44 D.L.R. 4th 385, 403-04 (Can. 1988).

⁷⁴ 21a-22a, 29a-31a.

ing parental rights and interests above those of the minor, 92a-96a, the court of appeals plainly erred.⁷⁵

A. Parental Authority Over Minors Is Not Independent From Or Weightier Than A Minor's Liberty And Health Interests.

In the area of minors' reproductive decision-making, the decisions of this Court embrace the role of parents only insofar as parents may help to insure that a minor's interests are protected. The court of appeals sustained Minnesota's two-parent notice requirement based on an unarticulated independent right of parents which it treated as paramount to the interests of the minor. 92a.⁷⁶

⁷⁵ The court of appeals found that the district court erred in failing to "consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement." 92a.

⁷⁶ Whatever rights a parent may have, this Court has repeatedly emphasized that biological parenthood, without more, does not automatically carry with it a constitutionally protected right to the care and control of minor children, nor even to notice of events in their lives. Indeed, sharp distinctions have been drawn between the rights and interests of parents who are able to demonstrate a significant relationship with their children and those who are not. In a long line of cases, this Court has required more than a biological connection for the successful assertion of parental interests in the lives of children. See *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983) (unwed biological father who never had a significant custodial, personal, or financial relationship with his daughter had no constitutional right to notice and a hearing prior to her adoption); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1975) (unwed father, who had never exercised actual or legal custody over his child, suffered no constitutional deprivation from statute denying him the right to block his child's adoption); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (to grant unwed mother, but not unwed father, the right to block an adoption by withholding consent violates equal protection on the ground that classification "discriminate[s] against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."); *id.* at 392 ("where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of

This Court, however, has never held that parental interests carry greater weight in the constitutional analysis than the privacy interests of the mature minor. In *Danforth*, this Court found that:

Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

428 U.S. at 75.⁷⁷ The subsequent decisions of this Court extend this principle by requiring that even immature minors be provided with a forum in which they may demonstrate that an abortion without parental involvement is in their best interests. *Ashcroft*, 462 U.S. at 490-491; *Bellotti II*, 443 U.S. at 643-44. This Court's decisions outside the privacy context are not inconsistent with these principles. The oft-cited cases of *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), do not support broad parental authority to control a minor's choice between abortion and motherhood. In *Prince*, this Court recognized the liberty interests of parents but held that the state's interest in preventing severe harm to children was of sufficient weight to override such parental interests. 321 U.S. at 165-170 (sustaining a child labor law). In *Pierce*, this Court found a compulsory public school attendance statute to "interfere with the liberty of parents and guardians to direct the upbringing and education of

that child"). In each of these cases, the Court has recognized the basic principle that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr*, 463 U.S. at 260 (emphasis in original) (quoting *Caban*, 463 U.S. at 397 (Stewart, J., dissenting)); *id.* at 262 (where the natural father fails to accept any responsibility for the child's future "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie").

⁷⁷ While this Court has since noted that there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment," *Matheson*, 450 U.S. at 408, the record unequivocally supports the district court's finding that there is a relationship between maturity and the desire for privacy regarding the abortion choice. 28a, 42a.

children under their control." *Id.* at 534-535. Neither of these cases involved a conflict between the interests of parents and the rights of their minor children and neither involved the right of a minor to make a decision "[so] personal and intimate, [so] properly private, or [so] basic to individual dignity and autonomy," as that between pregnancy termination and unwanted parenthood. See *Thornburgh*, 476 U.S. at 772.⁷⁸

Where, however, a conflict between parents and their children has been presented, courts have relied heavily on the language in *Prince* to the effect that "neither rights of religion nor rights of parenthood are beyond limitation." 321 U.S. at 166.⁷⁹ If parental rights and interests were not thus limited, forcing the risks of pregnancy and childbearing on a pregnant teenager, see

⁷⁸ Indeed, in the highly personal and individual decision regarding which parent should have custody of a child, Minnesota courts, for example, have accorded considerable weight to the child's choice even above and beyond the preferences of natural parents. A leading custody case, *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985), sets up a custody preference for the "primary caretaker" and later cases have consistently held that "*Pikula* directs that the child's preference be of significant weight if the child is old enough." *Stienke v. Stienke*, 428 N.W.2d 579, 582 (Minn. Ct. App. 1988); *Nies v. Nies*, 407 N.W.2d 484, 487 (Minn. Ct. App. 1987); *Peterson v. Peterson*, 394 N.W.2d 586, 588 (Minn. Ct. App. 1986); *Mowers v. Mowers*, 406 N.W.2d 60, 63-4 (Minn. Ct. App. 1987). The court has further stated that not only is the child's preference an important factor, but may be "in close cases a deciding factor as to which parent will have custody of the child." *Uhl v. Uhl*, 395 N.W.2d 106, 109-10 (Minn. Ct. App. 1986) (emphasis added) (citing *Schultz v. Schultz*, 383 N.W.2d 379, 382 (Minn. Ct. App. 1986)). See also *Maxfield v. Maxfield* 439 N.W.2d 411, 414-15 (Minn. Ct. App. 1989).

⁷⁹ In *Parham v. J.R.*, 442 U.S. 584 (1979), however, this Court upheld a statute that granted parents the right to voluntarily commit their child to a state mental hospital. Although the Court affirmed the presumption "that natural bonds of affection lead parents to act in the best interests of their children," *id.* at 602 (citation omitted), the presumption was premised on the presence of some level of functional family relationship between the child and the parents. It strains belief to suggest that the Court in *Parham* contemplated commitment of a minor by a biological parent who has never met her over the objections of the minor and/or her custodial parent. See *id.* at 604. Note also that *Parham* involved a decision to commit a child which, unlike a decision to compel pregnancy, childbirth or motherhood, is revocable. Indeed, the Court in *Parham* specifically required subsequent review of the parental decision. *Id.* at 607.

Facts, *supra*, § 2(b) would be a parental prerogative,⁸⁰ as would the similarly invasive acts of forcing an abortion,⁸¹ preventing life-saving medical treatment,⁸² or preventing medical treatment not necessary to save the life of the minor.⁸³

The rule emerging from these decisions is not new. Blackstone already recognized that "[t]he power of parents over their children is derived from . . . their duty." 1 W. Blackstone, *Commentaries* *452. Following an exhaustive analysis of Blackstone on this point, the British House of Lords recently upheld the discretion of a physician to provide contraceptives to a minor without parental knowledge or consent. *Gillick v. West Norfolk and Wisbech Area Health Authority*, 3 All E. R. 402

80 For example, in an Oklahoma case, a 12-year-old girl was raped by three teenagers and, as a result, contracted VD and became pregnant. Her mother sought to prevent her from having an abortion. The district court of Oklahoma found that the life of the minor was endangered as a result of the pregnancy, ordered that the girl be made a ward of the court and authorized the abortion and any other necessary medical treatment. The state Supreme Court affirmed. *In re D.C.*, JF No. 81-1555 (Okla. Dist. Ct. Okla. Cty., Sept. 22, 1981), *aff'd*, No. 57,472 (Okla. Sup. Ct. Sept. 28, 1981), reprinted in Exhibit E. Subsequently, the girl decided that she no longer wanted the abortion, and the district court order was dissolved. See *The Daily Oklahoman*, Oct. 7, 1981, at 1.

81 In *In re Mary P.*, 111 Misc. 2d 532, 444 N.Y.S.2d 545 (N.Y. Fam. Ct. Queens Cty. 1981), for example, a mother sought to have her 15-year-old daughter adjudged "a person in need of supervision" because the minor refused to have an abortion. The court not only rejected this attempt by the parent to interfere with the minor's choice, but issued an order prohibiting future interference with the minor's "determination to deliver her child." 111 Misc. 2d at 536, 444 N.Y.S.2d at 548; see also *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972).

82 See, e.g., *People ex. rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952) (ordering blood transfusion over parents' objection); *Morrison v. State*, 252 S.W.2d 97 (Mo. App. 1952) (same); cf. *Jehovah's Witnesses v. King City Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge court), *aff'd*, 390 U.S. 598 (1968) (per curiam) (dismissing constitutional challenge to state statute authorizing blood transfusions to children over objection of parents).

83 See *In re Jensen*, 54 Or. App. 1, 633 P.2d 1302 (1981); *In re Karwath*, 199 N.W.2d 147 (Iowa 1972); *In re Sampson*, 29 N.Y.2d 900, 328 N.Y.S.2d 686, 687 (1972) (per curiam).

(H.L. 1985). Lord Fraser stated that the "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family." *Id.* at 410.⁸⁴

There is, thus, no support in either present law or history for the broad assertion of parental interests employed by the court of appeals to sustain Minnesota's law.

B. States Have Universally Recognized The Paramount Importance Of Confidentiality To The Health And Welfare Of Minors.

States have uniformly elected to protect the confidentiality of minors seeking health care. All fifty states have enacted statutes that protect the confidentiality of a minor's decision to seek health care for medical problems related to sexual activity. See generally Exhibit C. For example, every state but one specifically allows minors to consent to medical treatment⁸⁵ for what they label as either sexually transmitted diseases (twelve states), venereal disease (thirty-six states), or diseases which must be reported to government health officials (one state). *Id.*⁸⁶ Indeed, a majority of states specifically authorize minors to consent to pregnancy-related health care such as pregnancy test-

84 Analyzing Blackstone further, Lord Fraser wrote:

The principle [in Blackstone] is that parental right or power of control of the person and property of the child exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions . . . the [basic] principle [is] that parental right endures only so long as it is needed for the protection of the child.

Id. at 421. See also *id.* at 410-413.

85 South Carolina, the exception, permits older minors to consent to any medical treatment except operations. See Exhibit C.

86 In a recent trend, states have also begun to enact statutes permitting minors to consent to testing for AIDS. See, e.g., Cal. Health & Safety Code § 199.27(a)(1) (West Supp. 1989); Del. Code Ann. tit. 16, § 1202 (Supp. 1988).

ing, prenatal care, cesarean sections and other delivery services (twenty-seven states). *Id.* Moreover, a total of forty-three states specifically insure the confidentiality of minors seeking drug and/or alcohol treatment. See Exhibit D. Even where states do not specifically grant to minors a right to consent to medical treatment, it is widely accepted that parents may not make health care decisions if those decisions will jeopardize the life or health of their children. See cases cited *supra* at Point II(A). Finally, the majority of states permit emancipated minors, "mature minors," or older minors to consent to all medical treatment.⁸⁷

The statutory trend affording minors the right to consent to medical treatment reflects a legislative judgment that parental involvement in medical decisions is unnecessary due to the overall competence of minors to make medical decisions in consultation with health professionals. See Facts, *supra*, § 2(a). It is also a recognition that parental involvement in health care decisions can be abusive.⁸⁸ Finally, and of quintessential impor-

87 See English, *Adolescent Health Care: Barriers to Access—Consent, Confidentiality, and Payment* in *Special Issue, Clearinghouse Review* 481, 483 (1986) (footnotes omitted); Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 De Paul L. Rev. 289, 294, 305 (1979); *Principles of Pediatrics, Health Care of the Young* 525 (Hoekelman ed. 1978); Katz, Schroeder & Sidman, *Emancipating our Children: Coming of Legal Age in America*, 7 Fam. L. Q. 211 (1973).

88 As Judge Nanette Dembitz of New York State Family Court observed:

[parents] who have opposed their unmarried daughters' efforts to secure abortions variously have expressed a vengeful desire to punish the daughter for her sexual activity by making her suffer the unwanted child, a fervor to impose a religious conviction the mother has failed to instill in her daughter, a hope of caring for her daughter's baby as her own because of an inability or unwillingness to bear another child herself, a defensive or resentful attitude because [the mother of the pregnant minor] bore illegitimate children without seeking or being able to secure an abortion, or a general distaste for abortion. None of these parental reasons for objecting relates to the daughter's well-being—only to that of the mother.

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 Colum. L. Rev. 1251, 1255 (1980). See Facts, *supra* at § 3.

tance, it is a recognition that minors will be deterred from seeking critical medical care if confidentiality is not guaranteed.

The Eighth Circuit's elevation of parental interests would threaten to invalidate a large number of these confidentiality statutes as well as the very statute of which Minnesota's two-parent notification requirement is a part. See Minn. Stat. § 144.343(1). 1a.⁸⁹ Indeed, to the extent the state would argue that this is not true, the state's asserted interests appear disingenuous. For if a legislature can dispense with parental involvement in health care decisions, particularly health decisions involving contraception and the treatment of pregnancy, these same parental interests cannot provide an independent constitutional basis for parental involvement in the abortion decision alone.

III. THE MINNESOTA STATUTE'S REQUIREMENT THAT THE MINOR WAIT FORTY-EIGHT HOURS AFTER NOTICE TO HER PARENTS IS UNCONSTITUTIONAL.

A waiting period of at least forty-eight and commonly seventy-two hours between written notification and the abor-

89 Federal statutes recognizing these same considerations would be jeopardized as well. See, e.g., cases construing Title X, Public Health Service Act, 42 U.S.C. § 300(a) et seq. (Supp. 1989): *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) ("Thus Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurance, one of the primary purposes of Title X—to make family planning services readily available to teenagers—would be severely undermined"); *New York v. Heckler*, 719 F.2d 1191 (2d Cir. 1983); *Planned Parenthood Ass'n v. Matheson*, 582 F.Supp. 1001 (D. Utah 1983); and cases construing Title XIX of the Social Security Act ("Medicaid") 42 U.S.C. § 1396d(a)(4)(c) (Supp. 1989): *T.H. v. Jones*, 425 F. Supp. 873, 878 (D. Utah 1975) ("The legislative history of the 1972 amendments bears out Congress' concern that AFDC and Medicaid family planning services be provided to sexually active minors who desire them on a confidential basis; in this way Congress has sought to stem the rising number of births out of wedlock . . ."), *aff'd mem. on statutory grounds*, 425 U.S. 986 (1976); *Planned Parenthood Ass'n of Utah v. Dandoy*, 810 F.2d 984 (10th Cir. 1987).

tion procedure is mandated by Minn. Stat. § 144.343(2).⁹⁰ The circuit court's approval of this requirement contradicts the decisions of nearly every other court that has considered the constitutionality of a waiting period, including this Court's decision in *Akron*.⁹¹ 462 U.S. at 450 (twenty-four hour waiting period was unconstitutional because the city "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period"). See also *Zbaraz*, 763 F.2d at 1537-38 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S.Ct. 479 (1987); *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1142-43 (7th Cir. 1983).

The circuit court found that the waiting period was justified by "Minnesota's interest in ensuring that notification results in parental involvement." 97a (footnote omitted). Though this

⁹⁰ The statute prohibits the abortion from being performed "until at least forty-eight hours after written notice of the pending operation has been delivered." Minn. Stat. § 144.343(2), at 1a. When the notice is mailed, "time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing." Minn. Stat. § 144.343(2)(b) at 1a-2a. If notice were mailed just prior to midnight, slightly more than 60 hours would pass between mailing and the time the abortion could be performed. However, the district court found, and the circuit court agreed, that minors who notified their parents by mail "commonly waited 72 hours between initiating the notification process and the abortion itself," 22a, 96a, reflecting the fact that most such mail is sent during the business day. Although the statute permits notice by personal delivery, Minn. Stat. § 144.343(2)(a), the personal delivery option was in practice confused with a consent requirement. See J.A. 287-88.

⁹¹ Although *Akron* involved a waiting period after informed consent by an adult woman, the Minnesota statute's waiting period applies both to mature minors capable of informed consent who choose to notify their parents rather than go through the bypass procedure and to emancipated minors who have the legal status of adults. More importantly, the Court's decision in *Akron* seems to be based less on the fact that the woman was capable of informed consent than on the arbitrariness of the requirement. 462 U.S. at 450-51.

state interest may be legitimate, it does not follow that an "arbitrary and inflexible" forty-eight hour waiting period is narrowly tailored to serve that state interest. As the district court noted, "a shorter waiting period would effectuate that interest as completely" as a full three-day period. 49a; see also 32a. Further, the burden imposed by the inflexibility of the waiting period is clearly demonstrated in situations where a minor who has fully consulted with both her parents about the abortion must nonetheless wait three days after formal mailed notice or two days after personal notice. Therefore, the Minnesota forty-eight hour waiting period is not narrowly drawn to serve the state's interest in fostering parental involvement,⁹² and should be held unconstitutional by this Court.

IV. THE TWO-PARENT NOTIFICATION REQUIREMENT IS INTEGRAL TO THE STATUTE AND NOT SEVERABLE.

The district court correctly ruled that the statute's two-parent definition of "parent," 2a, was "inseparably intertwined within Minn. Stat. § 144.343(2)-(7)," and enjoined the statute in its entirety. 51a.⁹³ The appellate panel agreed, but the *en banc*

⁹² The circuit court's suggestion that the minor could avoid the 48-hour waiting period by resorting to the bypass, 96a-97a, distorts the purpose of the bypass. See Point I(C) *supra*. A minor otherwise willing to notify her parents about her abortion choice should not be deterred from seeking parental involvement or channelled into the judicial system in order to avoid an arbitrary waiting period. Further, it is frequently the case that the bypass procedure takes longer than 48 hours, so there would be no time saved by taking the bypass route. 18a, 20a.

⁹³ The district court wrote that:

The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. . . . In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. . . . Any [such alternatives], however, would leave Minn. Stat. 144.343(2)-(7) with little resemblance to the program actually intended by the Minnesota legislature.

court did not reach the issue. Should this statute's two-parent requirement be invalidated, the district court's holding on severability should be affirmed.⁹⁴

The trial court's construction of a state statute is entitled to deference unless "clearly erroneous." *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985). The district court properly applied the test required by this Court for determining severability: "whether the statute will function in a manner consistent with the intent of [the legislature]." *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). Since severance of the two-parent definition of parent would eviscerate the intent of the statute, the entire statute must fall if the two-parent notice requirement is found unconstitutional.

An essential goal of the Minnesota legislature was to provide both biological parents with notice. *See* Exhibit G. Severance of that requirement would render the statute "incapable of accomplishing the legislative purposes." *Brockett*, 472 U.S. at 506 (quoting *State v. Anderson*, 81 Wash.2d 234, 236, 501 P.2d 184, 185-186 (1972)). Indeed, the statute itself recognizes in subd. 6 that the provision for two-parent notice without bypass might be enjoined, and provides as an alternative two-parent notice with bypass. But either alternative requires notice to both biological parents as its central feature.⁹⁵

Judicial rewriting of the statute is made impossible by the language of § 144.343(6)(c)(i). While subd. 3 defines the singular "parent" to mean "both parents," subd. 6(c)(i) uses the plural "parents" not once, but twice. Severing or editing subd. 3 would not solve the problem this choice of words creates. Eliminating the word "parents" from either or both places in subd. 6(c)(i) would render its operative provisions meaningless. The only solution would be to change the plural word "parents" to the singular word "parent." To do that would be to create a new statute which indisputably conflicts with the language and intent of the law as passed by the legislature. Thus,

⁹⁴ If this Court invalidates this statute on grounds other than the two-parent requirement alone, this case should be remanded for full briefing on all issues of severability.

⁹⁵ Subd. 3, defining "parent" as "both parents of the pregnant woman if they are both living," applies to both subd. 2 and subd. 6.

the district court was correct in concluding that it was "ill-situated" to choose between the many possible ways of rewriting the statute. 51a.⁹⁶

CONCLUSION

Petitioners respectfully request this Court to reverse the judgment of the Eighth Circuit Court of Appeals and to declare that Minn. Stat. § 144.343(2)-(6) is unconstitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman
& Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
JOHN POWELL
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties
Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

⁹⁶ When unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887); accord *Field v. Clark*, 143 U.S. 649, 695-96 (1892).

APPENDIX

Exhibit A

Thirty-one states have parental notification or consent statutes¹ which are either in effect, under judicial review, or facially unconstitutional and generally not enforced.²

I. NOTIFICATION—eleven states

ARKANSAS: 1989 Ark. Acts 270; **GEORGIA:** Ga. Code Ann. § 15-11-112 (Supp. 1988); **IDAHO:** Idaho Code § 18-609(6) (1987); **ILLINOIS:** Ill. Ann. Stat. ch. 38 para. 81-64.4 (Smith-Hurd Supp. 1988); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-103 (1987); **MINNESOTA:** Minn. Stat. § 144.343(2)-(6); **MONTANA:** Mont. Code Ann. § 50-20-107 (1987); **NEVADA:** Nev. Rev. Stat. § 442.255 (1987); **OHIO:** Ohio Rev. Code Ann. § 2919.12 (Anderson 1987); **UTAH:** Utah Code Ann. § 76-7-304 (1978); **WEST VIRGINIA:** W. Va. Code § 16-2F-3(a) (1985).

A. Enforced—two states

ARKANSAS, WEST VIRGINIA

B. Enjoined—five states

GEORGIA: *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988) (preliminary injunction); **ILLINOIS:** *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987) (*per curiam*); **MINNESOTA:** *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and withdrawn*, 835 F.2d 1545 (8th Cir. 1987) (*per curiam*), *reh'g en banc granted*, 835 F.2d

¹ The Maine statute, Me. Rev. Stat. Ann. ch. 22, § 1597A (1989), is excluded from this list because it contains a provision for the physician to obtain consent solely from the minor.

² This list does not contain those state laws which have been permanently enjoined and are not currently on appeal.

1546 (8th Cir. 1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), *stayed pending appeal*, Nos. 86-5423, 5431 (8th Cir. Oct. 7, 1988) (*en banc*) (110a), *cert. granted*, 109 S. Ct. 3240 (1989); **NEVADA**: *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985) (preliminary injunction); **OHIO**: *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) (permanent injunction), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989).

C. *Facially Unconstitutional, Generally Not Enforced*³—four states

IDAHO: Idaho Code § 18-609(6) (Supp. 1987); **MARYLAND**: Md. Health-Gen. Code § 20-103(a-c) (1987);⁴ **MONTANA**: Mont. Code § 50-20-107(1)(b) (1987); **UTAH**: Utah Code Ann. § 76-7-304(2) (1978).

II. *CONSENT*—twenty states

ALABAMA: Ala. Code § 26-21-1 to 26-21-8 (Supp. 1988); **ALASKA**: Alaska Stat. § 18.16.010(a)(3) (1986); **ARIZONA**: Ariz. Rev. Stat. Ann. § 36-2152 and 36-2153 (Supp. 1988);⁵ **CALIFORNIA**: Cal. Health & Safety Code § 25958 (Supp. 1988); **DELAWARE**: Del. Code Ann. tit. 24 § 1790(b)(3) (1987); **FLORIDA**: Fla. Stat. Ann. § 390-001(4)(b) (West 1986); **INDIANA**: Ind. Code Ann. § 35-1-38.5-2.5 (West Supp. 1988); **KENTUCKY**: Ky. Rev. Stat. Ann. § 311.732 (Baldwin Supp. 1988); **LOUISIANA**: La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1988); **MASSACHUSETTS**: Mass. Gen. Laws Ann. ch. 112,

³ Unless otherwise indicated, these laws are presumed unconstitutional because they lack a judicial bypass. *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁴ Unconstitutional per Opinion of the Attorney General, No. 85-035 (Dec. 31, 1985).

⁵ On May 22, 1989, Arizona enacted a new parental consent statute; § 36-2152 and 36-2153 (1989). This new statute will go into effect on September 15, 1989.

§ 12S (West 1983); **MISSISSIPPI**: Miss. Code Ann. § 41-41-53 (Supp. 1988); **MISSOURI**: Mo. Ann. Stat. § 188.028 (Vernon Supp. 1989); **NEW MEXICO**: N.M. Stat. Ann. § 30-5-1(c) (1984); **NORTH DAKOTA**: N.D. Cent. Code § 14-02.1-03.1 (Supp. 1987); **PENNSYLVANIA**: 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); **RHODE ISLAND**: R.I. Gen. Laws § 23-4.7-6 (1985); **SOUTH CAROLINA**: S.C. Code Ann. § 44-41-30(b) (1985) (unmarried women under the age of 16); **SOUTH DAKOTA**: S.D. Codified Laws Ann. § 34-23A-7 (1986); **TENNESSEE**: Tenn. Code Ann. § 37-10-303 (Supp. 1988); **WYOMING**: Wyo. Stat. § 35-6-118 (1989).⁶

A. *Enforced*—nine states

ALABAMA, INDIANA, KENTUCKY,⁷ LOUISIANA, MASSACHUSETTS, MISSOURI, NORTH DAKOTA, RHODE ISLAND, WYOMING

B. *Enjoined or Declared Unconstitutional*—six states

ARIZONA: *Roe v. Collins*, No. CIV. 85-2118 PHX CLH (D. Ariz. August 14, 1987) (permanent injunction); **CALIFORNIA**: *American Academy of Pediatrics, California District IX v. Van de Kamp*, No. 884574 (Calif. Super. Ct., San Francisco Cty. Dec. 28, 1987) (preliminary injunction); **FLORIDA**: *In Re: T.W.*, No. 89-893 (5th Dist. Fla. Ct. App. May 13, 1989); **MISSISSIPPI**: *Barnes v. Mississippi*, No. J86-0458(W) (S.D. Miss. July 24, 1986) (preliminary injunction); **PENNSYLVANIA**: *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction); **TENNESSEE**: *Planned Parenthood Association of Nashville v. McWherter*, No. 3:89-0520 (M.D. Tenn. June 30, 1989).

⁶ This law requires the notice and consent of one parent for all minor women seventeen or under.

⁷ The district court partially enjoined the law, but upheld it as modified. *See Eubanks v. Wilkinson*, No. C82-0360-L(A), slip op. at 35-36 (W.D. Ky. Aug. 23, 1988), *appeal docketed*, No. 88-6085 (6th Cir. Sept. 22, 1988), No. 89-5353 (6th Cir. Mar. 21, 1989).

C. *Facially Unconstitutional, Generally Not Enforced*⁸—
five states

ALASKA: Alaska Stat. § 18.16.010(a)(3) (1986);⁹ **DELAWARE:** Del. Code Ann. tit. 24 § 1790(b)(3) (1987);¹⁰ **NEW MEXICO:** N.M. Stat. Ann. § 30-5-1(c) (1984); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23A-7 (1986); **SOUTH CAROLINA:** S.C. Code Ann. § 44-41-30(b) (1985).

⁸ Unless otherwise indicated, these laws are presumed unconstitutional because they lack a judicial bypass. *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁹ Unconstitutional per Opinion of the Attorney General, No. 8 (Feb. 10, 1978).

¹⁰ Policy of nonenforcement announced by the State Attorney General on March 24, 1977, and reprinted in *Delaware Women's Health Org. v. Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977).

Exhibit B

For the convenience of the Court, plaintiffs provide this brief description of their expert witnesses:

Dr. Stanley Henshaw testified about the effect of the notification laws on teen pregnancy and abortion rates and on the need for abortion services. He is the Deputy Director for Research and Planning of the Alan Guttmacher Institute, where he directs research on abortion studies including periodic surveys of all abortion providers in the United States, the availability of abortion services throughout the country and the number of abortions which take place each year in each geographical area of the United States. In addition, Dr. Henshaw is the author or co-author of eighteen publications, including a study of teenage pregnancy in the United States and the developed countries. See P. Ex. 26 (resume); Henshaw Tr. at 2.

Dr. Lenore Walker testified about the effect of forced notification on abusive and dysfunctional families. Dr. Walker is licensed to practice psychology in Colorado and New Jersey. Dr. Walker has published extensively in the area of family violence, and is the sole author of five books, and the contributing author of several other books. In addition, she has written articles in professional journals, and has presented approximately 100 papers at various professional meetings and conferences. See P. Ex. 36 (resume); Walker Tr. at 289.

Dr. Steven Butzer testified with regard to issues of adolescent sexuality and decision making. He is a board certified psychiatrist and faculty member of the Department of Psychiatry at the University of Minnesota, School of Medicine. Dr. Butzer also has a large clinical practice in which roughly a quarter of his patients are adolescents. Dr. Butzer has served as staff psychiatrist at the Naval Regional Medical Center in Oakland, California and at St. Paul-Ramsey Medical Center, St. Paul, Minnesota where he was also Director of In-Patient Psychiatry Service. See P. Ex. 37 (resume); Butzer Tr. at 1335.

Dr. Gary Melton testified as to the ability of adolescents to consent to abortion procedures and on the psychological effects of the Minnesota statute. He is currently a Professor of Psychology and Law and Director of the Law/Psychology Program at the University of Nebraska. Dr. Melton has also been in private practice since 1980. He has extensive experience in the area of child and family psychology. Part of Dr. Melton's position entails running periodic workshops, mostly under the auspices of the National Council of Juvenile and Family Court Judges. In addition, Dr. Melton has published over 100 articles, books and papers, including a book, *Adolescent Abortion: Psychological and Legal Issues* (1986). Dr. Melton has acted as consultant to the National Council of Juvenile and Family Court Judges and the American Academy of Judicial Education. See P. Ex. 38 (resume); Melton Tr. at 1104.

Dr. Elissa Benedek is a nationally recognized expert in the areas of child and adolescent psychiatry. She is the Director of Research and Training at the Center of Forensic Psychiatry in Ann Arbor, Michigan, Clinical Professor of Psychiatry at the University of Michigan Medical Center, and is Associate Clinical Professor of Psychiatry at both Wayne State Medical Center in Detroit and Michigan Medical Center in Lansing. Prior to her present position, Dr. Benedek worked at a residential treatment center for children and adolescents. Dr. Benedek has published four books and 37 articles in scientific journals; contributed chapters in 20 books; written 34 book reviews and over 100 abstracts, papers and panel discussions. See P. Ex. 40 (resume); Benedek Tr. at 849.

Dr. Jane Hodgson, one of the plaintiffs, provided testimony on the issues of abortion safety, teen pregnancy and decision making. Her patient load is about 30 percent teenagers. She has personally counseled several thousand minors about their pregnancies. Dr. Hodgson has had over 45 years of experience as an obstetrician and gynecologist. She is a founding fellow of the American College of Obstetrics and Gynecology. In 1983 she was nominated woman Physician of the Year by the Medical Women of Minnesota. She was Director of the Fertility Control Clinic at St. Paul-Ramsey Hospital from 1973-1979 and Medi-

cal Director of Planned Parenthood of Minnesota from 1980-1983, directing the work of three clinics during this period. Dr. Hodgson has published over 47 pregnancy-related articles. See P. Ex. 1 (curriculum vitae); Hodgson Tr., Vol. I at 1.

Dr. Henry David testified about reproductive behavior and psychological sequelae following abortions. He is a psychologist with a subspecialty in international and domestic adolescent and adult abortion behavior. Dr. David is Director of the Transnational Family Research Institute and Associate Clinical Professor of Psychology in the Department of Psychiatry at the University of Maryland Medical School. In 1963, Dr. David became Associate Director of the World Federation for Mental Health and a Consultant for the World Health Organization. Dr. David has done original research and published extensively in the area of adolescent and adult reproductive behavior and psychological sequelae. See P. Ex. 123 (resume); David Tr. at 2522.

Dr. Edward Ehlinger testified on the effect of the notification statute on teen pregnancy and abortion rates in the City of Minneapolis. He is the Director, Division of Personal Health Services, Minneapolis Health Department. The division includes Maternal and Child Health, Dental Health, Nutrition, Health Education, and Public Health Laboratory. Dr. Ehlinger is a board certified physician in both pediatrics and internal medicine. He is also a Clinical Assistant Professor, Program in Maternal and Child Health, at the School of Public Health, University of Minnesota, and an Instructor, Department of Pediatrics, at the School of Medicine, University of Minnesota. See P. Ex. 115 (curriculum vitae); Ehlinger Tr. at 2017.

Exhibit C

Every state has enacted a specific statute allowing minors themselves to consent to health services for venereal disease or sexually transmitted diseases, or has enacted a general medical treatment consent statute.

Venereal Disease:

ALABAMA: Ala. Code § 22-8-6 (1984) (medical, health or mental health services to determine the presence of, or to treat venereal disease); **ALASKA:** Alaska Stat. § 09.65.100(a) (4) (1983) (diagnosis and treatment of venereal disease); **ARIZONA:** Ariz. Rev. Stat. Ann. § 44-132.01 (1987) (hospital or medical care related to diagnosis or treatment of venereal disease); **ARKANSAS:** Ark. Stat. Ann. § 20-16-508(a)(1) (1987) (medical or surgical care or services for venereal disease); **COLORADO:** Colo. Rev. Stat. § 25-4-402(4) (1982) (diagnostic examination, prescription and treatment for venereal disease); **CONNECTICUT:** Conn. Gen. Stat. § 19a-216 (1989) (examination and treatment for venereal disease); **GEORGIA:** Ga. Code Ann. § 31-17-7(a) (1985) (medical or surgical care or services for venereal disease); **HAWAII:** Hawaii Rev. Stat. § 577A-2 (1985) (medical care and services for venereal disease); **ILLINOIS:** Ill. Ann. Stat. ch. 111, § 4504 (Smith Hurd Supp. 1989) (medical care or counseling related to the diagnosis or treatment of venereal disease); **INDIANA:** Ind. Code Ann. § 16-8-5-1 (Burns 1983) (any person may consent to medical or hospital care or treatment for venereal disease); **IOWA:** Iowa Code Ann. § 140.9 (West 1989) (diagnosis or treatment for venereal disease); **KANSAS:** Kan. Stat. Ann. § 65-2892 (1985) (diagnostic examination and treatment for venereal disease); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185(1) (Bobbs-Merrill Supp 1988) (diagnostic examination and treatment for venereal disease); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1065.1(A) (West 1977) (medical or surgical care or services for venereal disease); **MAINE:** Me. Rev. Stat.

Ann. tit. 32, § 3292 (1988) (medical care for treatment of venereal disease); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-102(c)(3) (1987) (treatment for or advice about venereal disease); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 111, § 117 (West 1983) (physical examination and treatment of venereal diseases); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.5257(1) (West 1980) (medical or surgical care, treatment, or services for venereal disease); **MINNESOTA:** Minn. Stat. § 144.343(1) (1989) (medical, mental and other health services to determine presence of or to treat venereal disease); **MISSISSIPPI:** Miss. Code Ann. § 41-41-13 (1981) (medical care for treatment of venereal disease); **MISSOURI:** Mo. Ann. Stat. § 431.061(1)(4)(b) (Vernon Supp. 1989) (surgical, medical or other treatment or procedures for venereal disease); **MONTANA:** Mont. Code Ann. § 41-1-402(1)(c) (1987) (prevention, diagnosis or treatment for venereal disease); **NEVADA:** Nev. Rev. Stat. § 129.060 (1987) (examination or treatment, or both, for venereal disease); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-4 (Supp. 1989) (medical or surgical care or services for venereal disease); **NEW MEXICO:** N.M. Stat. Ann. § 24-1-9 (1986) (examination and treatment for venereal disease); **NORTH CAROLINA:** N.C. Gen. Stat. Ann. § 90-21.5(a)(i) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of venereal disease); **NORTH DAKOTA:** N.D. Cent. Code § 14-10-17 (Supp. 1989) (14 or older may consent to examination or treatment of venereal disease); **OHIO:** Ohio Rev. Code Ann. § 3709.24.1 (Baldwin 1980) (diagnosis or treatment of venereal disease); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 1-532.1 (West 1984) (examination and treatment for venereal disease); **OREGON:** Or. Rev. Stat. § 109.610 (1987) (hospital, medical or surgical care for diagnosis or treatment of venereal disease); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 35, § 521.14a (Purdon 1977) (treatment of venereal disease); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23-16 (1986) (diagnostic examination and treatment for venereal disease); **VERMONT:** Vt. Stat. Ann. tit. 18, § 4226 (1982)

(12 or older may consent to medical treatment and hospitalization for venereal disease); **VIRGINIA**: Va. Code § 54.1 2969 (D)(1) (Supp. 1989) (medical or health services needed to determine the presence of or to treat venereal disease); **WEST VIRGINIA**: W. Va. Code § 16-4-10 (1985) (examination, diagnosis, or treatment for venereal disease); **WYOMING**: Wyo. Stat. § 35-4-131(a) (1988) (examination and treatment for venereal disease).

Sexually Transmitted Diseases:

CALIFORNIA: Cal. Civ. Code § 34.7 (West 1982) (12 or older may consent to hospital, medical and surgical care related to the diagnosis or treatment of sexually transmitted diseases); **DELAWARE**: Del. Code Ann. 16 § 710 (1981) (12 or older may consent to diagnostic, preventive, medical or surgical treatment for any sexually transmitted diseases); **FLORIDA**: Fla. Stat. Ann. § 384.30(1) (West Supp. 1989) (diagnostic examination and treatment for sexually transmissible diseases); **NEBRASKA**: Neb. Rev. Stat. § 71-504 (Supp. 1988) (examination and treatment for sexually transmitted disease); **NEW HAMPSHIRE**: N.H. Rev. Stat. Ann. § 141-C:18 (II) (Supp. 1988) (14 years or older may consent to medical diagnosis and treatment for a sexually transmitted disease); **NEW YORK**: N.Y. Pub. Health Law § 2305(2) (Consol. 1987) (diagnosis or treatment for sexually transmissible disease); **RHODE ISLAND**: R.I. Gen. Laws § 23-11-11 (Supp. 1988) (examination and treatment for sexually transmitted disease); **TENNESSEE**: Tenn. Code Ann. § 68-10-104 (Supp. 1987) (examination, diagnosis or treatment for sexually transmitted diseases); **TEXAS**: Tex. Fam. Code Ann. § 35.03(a)(3) (Vernon Supp. 1989) (diagnosis and treatment of reported diseases including all sexually transmitted diseases); **UTAH**: Utah Code Ann. § 26-6-18(1)(2) (Supp. 1989) (medical care or services for sexually transmitted disease); **WASHINGTON**: Wash. Rev. Code Ann. § 70.24.110 (Supp. 1989) (14 or older may consent to hospital, medical and surgical care related to the diagnosis or

treatment of a sexually transmitted disease); **WISCONSIN**: Wis. Stat. Ann. § 143.07(1m) (West Supp. 1989) (treatment, examination and diagnosis for sexually transmitted disease).

General Medical Treatment Consent Statutes:

IDAHO: Id. Code § 39-3801 (1985) (14 or older may consent to hospital, medical or surgical care related to diagnosis or treatment of any reportable infectious disease); **SOUTH CAROLINA**: S. C. Code Ann. § 20-7-280 (Lawyers Co-op 1985) (16 or older may consent to health services other than operations).

Pregnancy-Related Health Care:

Twenty-seven states have minor consent statutes specifically authorizing minors to consent to pregnancy-related health services, including pregnancy testing, prenatal care and delivery services:

ALABAMA: Ala. Code § 22-8-6 (1984) (legally authorized medical, health or mental health services to determine the presence of, or to treat pregnancy); **ALASKA**: Alaska Stat. § 09.65.100(4) (1983) (diagnosis, prevention or treatment of pregnancy); **ARKANSAS**: Ark. Code Ann. § 20-9-602(4) (1987) (any surgical or medical treatment or procedures recommended by physician in connection with pregnancy or childbirth); **CALIFORNIA**: Cal. Civ. Code Ann. § 34.5 (West 1982) (hospital, medical, surgical care related to the prevention or treatment of pregnancy); **DELAWARE**: Del. Code Ann. tit. 13, § 708 (a), (b) (1981) (minor twelve or older may consent to diagnostic, preventive, lawful therapeutic procedures, medical or surgical care and treatment, including X-rays); **FLORIDA**: Fla. Stat. Ann. § 743.065(1) (West 1986) (medical or surgical care or services relating to her pregnancy); **GEORGIA**: Ga. Code Ann. § 31-9-2(a)(5) (1985) (surgical or medical treatment or procedures not prohibited by law for pregnancy); **HAWAII**: Hawaii Rev. Stat. § 577A-2 (1985) (medical care and services by

hospital, clinic or physician); **KANSAS**: Kan. Stat. Ann. § 38-123 (1986) (hospital, medical or surgical care related to pregnancy where no parent or guardian available); **KENTUCKY**: Ky. Rev. Stat. Ann. § 214.185(1) (Bobbs-Merril Supp. 1988) (diagnostic examination and treatment regarding pregnancy); **LOUISIANA**: La. Rev. Stat. Ann. § 40:1299.53 (e) (West 1977) (surgical or medical treatment or procedures including autopsy in connection with pregnancy or childbirth); **MARYLAND**: Md. Health-Gen. Code Ann. § 20-102 (c)(4) (1987) (treatment for or advice about pregnancy); **MICHIGAN**: Mich. Comp. Laws Ann. § 333.9132 (West Supp. 1989) (provision of prenatal and pregnancy related health care); **MINNESOTA**: Minn. Stat. § 144.343(1) (1989) (medical, mental and other health services to determine the presence of or to treat pregnancy and related conditions); **MISSISSIPPI**: Miss. Code Ann. § 41-41-3 (i) (Supp. 1988) (surgical or medical treatment or procedures not prohibited by law, in connection with pregnancy or childbirth); **MISSOURI**: Mo. Stat. Ann. § 431.061(1)(4)(a) (Vernon Supp. 1989) (any surgical, medical or other treatment not prohibited by law for pregnancy); **MONTANA**: Mont. Code Ann. § 41-1-402 (1)(c) (1987) (medical or surgical care or services for the diagnosis, prevention and treatment of pregnancy); **NEW JERSEY**: N.J. Stat. Ann. § 9:17A-1 (West 1976) (hospital, medical or surgical care and procedures related to her pregnancy or her child); **NEW MEXICO**: N.M. Stat. Ann. § 24-1-13 (1986) (examination and diagnosis by licensed physician for pregnancy); **NEW YORK**: N.Y. Pub. Health Law § 2504(3) (Consol. 1987) (medical, dental, health and hospital services relating to prenatal care); **NORTH CAROLINA**: N.C. Gen. Stat. § 90-21.5(a)(ii) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of pregnancy); **OKLAHOMA**: Okla. Stat. Ann. tit. 63, § 2602(A)(3) (West 1984) (services by health professionals for prevention, diagnosis and treatment of pregnancy. Health professional must also assume responsibility for counseling minor); **PENNSYLVANIA**: Pa. Stat. Ann. tit. 35, § 10103 (Purdon 1977) (medical and health services to determine the presence of or to treat pregnancy); **TENNESSEE**: Tenn. Code Ann. § 63-6-223 (1986) (examination, diagnosis and treatment for purpose of prenatal care); **TEXAS**: Tex.

Fam. Code Ann. § 35.03(a) (4) (Vernon Supp. 1989) (hospital, medical or surgical treatment related to her pregnancy); **UTAH**: Utah Code Ann. § 78-14-5(4)(F) (1987) (any female regardless of age, any health care not prohibited by law in connection with pregnancy or childbirth); **VIRGINIA**: Va. Code Ann. § 54.1-2969(D)(2) (Supp. 1989) (medical or health services required for pregnancy).

Exhibit D

Thirty-one states have minor consent statutes specifically covering health services related to both drug abuse and alcohol abuse and dependency; ten states have statutes covering health services related to drug abuse but not alcohol abuse; and two states have statutes covering health services related to alcohol abuse but not drug abuse.

Drug and Alcohol Abuse:

ALABAMA: Ala. Code § 22-8-6 (1984) (medical health or mental health services to determine the presence of, or treat drug dependency or alcohol toxicity); **ARIZONA:** Ariz. Rev. Stat. Ann. § 36-2024(A) (Supp. 1988) (an alcoholic may apply for evaluation and treatment; if the applicant is a minor, he, parent, or legal guardian shall make such application); Ariz. Rev. Stat. Ann. § 44-133.01 (1987) (any minor aged 12 or older who is found to be under the influence of a dangerous drug or narcotic by a licensed physician is to be regarded as having consented to hospital or medical care for treatment); **CALIFORNIA:** Cal. Civ. Code § 34.10 (a-c) (West 1982) (minor aged 12 years or older may consent to medical care and counseling to the diagnosis and treatment of a drug or alcohol related problem); **COLORADO:** Colo. Rev. Stat. § 13-22-102 (1987) (examination, prescription, and treatment of a minor addicted to drugs); Colo. Rev. Stat. § 25-1-308(1) (1982) (an alcoholic, including a minor, may apply for voluntary treatment directly to an approved treatment facility); Colo. Rev. Stat. § 25-1-309(1) (1987) (intoxicated person or person intoxicated or incapacitated by alcohol, including a minor, may voluntarily admit himself to an approved treatment facility); **CONNECTICUT:** Conn. Gen. Stat. § 19a-382 (Supp. 1989) (minor may request treatment and rehabilitation for drug dependence); Conn. Gen. Stat. § 17-155t(a)(d) (Supp. 1989) (an alcoholic minor may apply for voluntary treatment directly to a public treatment facility; request for discharge from an

inpatient facility shall be made by a parent, legal guardian or minor if he was applicant); **FLORIDA:** Fla. Stat. Ann. § 397.099 (West 1986) (rehabilitative or medical treatment for drug abuse or dependency); Fla. Stat. Ann. § 396.082(1) (West 1986) (treatment for alcoholism); **GEORGIA:** Ga. Code Ann. § 37-7-8(b) (1982) (medical or surgical services for treatment of drug abuse); Ga. Code Ann. § 37-8-31(a) (1986) (an alcoholic minor may make application for voluntary treatment of alcoholism; for a discharge from an inpatient facility, a written request shall be made by a parent, legal guardian or by the minor if he was the original applicant); **HAWAII:** Haw. Rev. Stat. § 577-26(e) (1985) (diagnosis, counseling and related activities for alcohol and drug abuse); **IDAHO:** Idaho Code § 37-3102 (1977) (minors aged 16 or older may consent to treatment or rehabilitation for drug addiction or dependency); Idaho Code § 39-307(1)(4) (Supp. 1989) (alcoholic or addict, including minors, may apply for voluntary treatment directly to any approved treatment facility; if minor leaves facility, request for discharge may be made by parent, guardian, or minor if he were (sic) the original applicant); **ILLINOIS:** Ill. Ann. Stat. ch. 111, para. 4504 (Smith-Hurd Supp. 1989) (minor 12 years or older who is determined to be an addict, alcoholic, or an intoxicated person may consent to medical care or counseling related to the diagnosis and treatment of drug use or alcohol consumption); **INDIANA:** Ind. Code Ann. § 16-13-6.1-23 (Burns 1983) (treatment for alcoholism, alcohol abuse, or drug abuse); **IOWA:** Iowa Code Ann. § 125.33(1) (West 1987) (treatment or rehabilitation services for alcohol or drug/chemical dependency); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185 (Baldwin Supp. 1988) (diagnostic examination, prescription, advice and treatment for alcohol or other drug abuse or addiction); **MAINE:** Me. Rev. Stat. Ann. tit. 22, § 1823 (Supp. 1988) (treatment for drug or alcohol abuse in a hospital); Me. Rev. Stat. Ann. tit. 32, § 3292 (1988) (medical care for treatment of drug or alcohol abuse); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.6121(1) (West 1980) (substance

abuse related medical or surgical care, treatment or services); **MINNESOTA**: Minn. Stat. § 144.343(1) (medical, mental and other health services to determine the presence of or to treat conditions associated with alcohol or drug abuse); **MISSISSIPPI**: Miss. Code Ann. § 41-41-14 (1981) (minors aged 15 or older may consent to treatment relating to mental or emotional problems caused by or related to alcohol or drugs); **MISSOURI**: Mo. Ann. Stat. § 431.061 (1)(4)(c) (Vernon Supp. 1989) (surgical or medical treatment for alcohol and drug abuse); Mo. Ann. Stat. § 631.115 (Vernon 1988) (a minor may apply for admission to treatment facility to receive treatment or rehabilitation for drug or alcohol abuse); **MONTANA**: Mont. Code Ann. § 41-1-402(c) (1987) (provision of medical or surgical care or services for drug and substance abuse, including alcohol); **NEBRASKA**: Neb. Rev. Stat. § 71-5041 (1986) (alcohol or drug abuse counseling or treatment); **NEW JERSEY**: N.J. Stat. Ann. § 9:17A-4 (West Supp. 1989) (a minor who is suffering from the use of drugs or is a drug dependent person may consent to treatment for drug use or drug abuse); N.J. Stat. Ann. § 26:2B-15 (West 1987) (any person who is an alcoholic may voluntarily apply for treatment); **NORTH CAROLINA**: N.C. Gen. Stat. § 90-21.5(a)(iii) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of abuse of controlled substances or alcohol); **NORTH DAKOTA**: N.D. Cent. Code § 14-10-17 (Supp. 1989) (minor aged 14 or older may consent to examination, care, or treatment for alcoholism or drug abuse); **OHIO**: Ohio Rev. Code Ann. § 3719.012(A) (Baldwin 1989) (diagnosis or treatment by a physician for abuse of drugs, beer or intoxicating liquor); **OKLAHOMA**: Okla. Stat. Ann. tit. 63, § 2602(A)(3) (West 1984) (services for prevention, diagnosis and treatment of drug and substance abuse or abusive use of alcohol); **RHODE ISLAND**: R.I. Gen. Laws § 14-5-4 (Supp. 1988) (parent consent not required for non-invasive non-custodial treatment of substance abuse or chemical dependency if in the judgment of a qualified professional, such consent would be deleterious to the minor voluntarily

seeking treatment); R.I. Gen. Laws § 40.1-4-9(1)(4) (Supp. 1988) (a minor may apply for voluntary treatment for alcoholism; a request for discharge from a treatment facility shall be made by a parent, guardian or the minor if he was the original applicant); **SOUTH CAROLINA**: S.C. Code Ann. § 44-52-20 (Law. Co-op. Supp. 1988) (minor aged 16 years or older may apply for admission to a treatment facility for treatment of chemical dependency on alcohol or other drugs); **SOUTH DAKOTA**: S.D. Codified Laws Ann. § 34.20A-50 (1986) (minor may make application to an accredited facility for treatment of drug and alcohol abuse); **WASHINGTON**: Wash. Rev. Code Ann. § 69.54.060 (1985) (minor aged 14 years or older may consent to counseling, care, treatment or rehabilitation for drug or alcohol abuse); **WEST VIRGINIA**: W. Va. Code § 60A-5-504(e) (1989) (examination, diagnosis, and treatment for any addiction to or dependency upon the use of a controlled substance); W. Va. Code § 60-6-23 (1989) (examination, counseling, diagnosis, and treatment for any addiction to or dependency upon the use of alcoholic liquor or non-intoxicating beer); **WISCONSIN**: Wis. Stat. Ann. § 51.47(1) (West 1987) (preventive, diagnostic, assessment, evaluation or treatment services for the abuse of alcohol or other drugs).

Drug Abuse:

KANSAS: Kan. Stat. Ann. § 65-2892a (1985) (examination and treatment for drug abuse, misuse, or addiction); **LOUISIANA**: La. Rev. Stat. Ann. § 40:1096(A) (West 1977) (drug treatment and medical or surgical treatment); **MASSACHUSETTS**: Mass. Gen. Laws Ann. ch. 112, § 12E (West 1983) (minor aged 12 years or older may consent to hospital and medical care related to diagnosis or treatment of drug dependency); **NEVADA**: Nev. Rev. Stat. Ann. § 129.050(1)(a)(b) (Michie Supp. 1989) (hospital, medical, surgical or other care for the treatment of drug abuse or related illnesses); **NEW HAMPSHIRE**: N.H. Rev. Stat. Ann. § 318-B: 12-a (1984) (minor aged 12

or older may voluntarily submit himself to treatment for drug dependency or any problem related to drug use); **NEW MEXICO:** N.M. Stat. Ann. § 26-2-14(A) (Supp. 1987) (drug abuse treatment); **OREGON:** Ore. Rev. Stat. § 109.675(1) (Supp. 1988) (minor 14 years or older may consent to outpatient diagnosis or treatment of chemical dependency, excluding methadone maintenance); **PENN-SYLVANIA:** Pa. Stat. Ann. tit. 71, § 1690.112 (Purdon Supp. 1989) (medical care or counseling related to diagnosis or treatment for use of any controlled or harmful substance); **TENNESSEE:** Tenn. Code Ann. § 63-6-220(a) (1986) (treatment for drug abuse by physician); **TEXAS:** Tex. Fam. Code Ann. § 35.03(6) (Vernon Supp. 1989) (examination and treatment for chemical addiction, chemical dependency, or any other condition related to chemical use); **VIRGINIA:** Va. Code Ann. § 54.1-2969(D)(3) (Supp. 1989) (medical or health services needed for treatment and rehabilitation for substance abuse).

Alcohol Abuse:

DELAWARE: Del. Code Ann. tit. 16, § 2210(b) (1983) (minor aged 12 or over may consent to voluntary treatment of alcoholism); **NEW YORK:** N.Y. Mental Hyg. Law § 21.11(c) (McKinney 1988) (parental involvement and consent not required for treatment of alcoholism on minor if such involvement and consent would be detrimental to minor's treatment or if such treatment is in best interests of minor).

Exhibit E

IN THE
DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA
JF NO: 81-1555

IN THE MATTER OF: D C
AN ALLEGED CHILD IN NEED OF SUPERVISION

JOURNAL ENTRY

Now on this 23rd day of September, 1981, this cause comes on for hearing.

Whereupon, the Juvenile's answer and cross-petition as a DEPRIVED child was presented with arguments of counsel. The State of Oklahoma confessed the cross-petition and the matter was heard as a DEPRIVED action.

Whereupon, all parties were advised of their statutory and constitutional rights; and no demand having been made for jury trial, witnesses were sworn and testimony taken.

The Court, after reviewing the files, hearing sworn testimony, receiving evidence, and being fully advised in the premises, finds:

That the material allegations set forth in the cross-petition on file herein are true; that the said cross-petition should be sustained by reason of testimony; and that said child should be made a ward of the Court as DEPRIVED under the provisions of 10 OSA 1101 (d).

Further the Court finds that said child is twelve (12) years of age; in the first trimester of pregnancy; that said pregnancy occurred as a result of rape; that said child desires an abortion;

that the life of the said child is endangered by this pregnancy as well as the life of the unborn fetus; and that said child had a venereal disease.

Further the Court finds that the respondent Mother of this Juvenile opposes abortion on religious grounds and desires that Juvenile continue her pregnancy to full term.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that said child be and is hereby made a ward of the Court as DEPRIVED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the custody of said child should be and is hereby placed with the Department of Human Services with the authority to place and with the authority to consent to any medical treatment necessary for pre-natal care, venereal disease or any other medical treatment which may be required by said child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that said pregnancy of said child be terminated by surgical procedure at the earliest possible date commensurate with the health and best interest of said child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the termination of pregnancy BE STAYED temporarily pending certification of this Order to the Supreme Court of the State of Oklahoma.

Certification of this Order is requested most urgently due to the finality of said Order should it be carried out; said question raised by this Order has not previously been addressed by the Supreme Court of Oklahoma; statutory provisions are nil; there is no case law in this State nor has the question been squarely addressed in other jurisdictions including the Supreme Court of the United States.

IT IS FURTHER ORDERED that this matter be set down for Disposition on a day certain subsequent to a decision by the Supreme Court of Oklahoma on the certification of the Order before this honorable court.

Donald C. Manning /s/
JUDGE OF THE DISTRICT COURT

I, Donald C. Manning, Judge of the District Court of Oklahoma County, do hereby certify to the Supreme Court the above question is one which has not been heretofore answered by the Oklahoma Supreme Court and that the import of the above question is one which needs an immediate decision due to the nature of the circumstances.

Donald C. Manning /s/
JUDGE OF THE DISTRICT COURT

A-22

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

No. 57,472

RE: D.C., a Child under Eighteen (18) years of age

ORDER

On consideration of the Mother's appeal from order declaring D. C., a child twelve (12) years of age, to be a deprived child and from one directing that her pregnancy be terminated,

THE COURT FINDS the evidence undisputed in support of the trial court's finding that her life is endangered by the pregnancy, and that the termination of her pregnancy is hence necessary.

The trial court's orders are not against the clear weight of the evidence and are affirmed.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE
this 28th day of September, 1981.

PAT IRWIN /s/

CHIEF JUSTICE

A-23

Exhibit F*

JOURNAL of the SENATE

STATE OF MINNESOTA

SEVENTY-SECOND LEGISLATURE

INCLUDING FIRST AND SECOND SPECIAL SESSIONS

1981

February 9, 1981

[880] Mr. Solon from the Committee on Health, Welfare and Corrections, to which was referred

S.F. No. 287: A bill for an act relating to health; prescribing procedures for notification of parents, guardians, and conservators prior to performing abortions on certain persons; providing a penalty; amending Minnesota Statutes 1980, Section 144.343.

Reports the same back with the recommendation that the bill be amended as follows:

Delete everything after the enacting clause and insert:

"Section 1, Minnesota Statutes 1980, Section 144.343, is amended to read:

* An authenticated copy of these relevant excerpts from the official Minnesota Senate Legislative Journal has been lodged with this Court by counsel for Petitioners. Each house of the Minnesota legislature is constitutionally required to keep a journal of its proceedings. Minn. Const. art. IV, § 15. See also Minn. Revisor's Office, *Minnesota Revisor's Manual with Styles and Forms* 34 (1984).

144.343 [PREGNANCY, VENEREAL DISEASE AND ALCOHOL OR DRUG ABUSE.]

Subdivision 1. [MINOR'S CONSENT VALID.] Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. [NOTIFICATION CONCERNING ABORTION.] No abortion operation shall be performed upon a minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) If the pregnant woman is unmarried and is living with her parent, the notice shall either be delivered personally to her parent and the putative father's parent or be delivered to the parents' usual places of abode and left with a person of suitable age and discretion residing therein other than the pregnant woman or the putative father.

(b) If the pregnant woman is unmarried and is not living with her parent, the notice shall either be delivered personally to her parent and the putative father's parent or be delivered to the parents' usual places of abode and left with a person of suitable age and discretion residing therein.

In lieu of the delivery required by clauses (a) and (b), notice may be made by [881] certified mail receipted for by the persons specified for delivery in clauses (a) and (b).

Subd. 3. [PARENT; DEFINITION.] For purposes of this section, "parent" means both parents of the pregnant woman, or both parents of the putative father, as applicable, if they are both living, one parent of the pregnant woman, or one parent of the putative father, as applicable, if only one is living or if the second one cannot be located through reasonably diligent

effort, or the guardian or conservator, if the pregnant woman, or the putative father, as applicable, has one.

Subd. 4. [LIMITATIONS.] No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time for providing the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. [PENALTY.] Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable for failure to deliver required notice if the person relied in good faith upon the representations of the pregnant woman regarding information necessary to deliver notice as required by this section or if the person has attempted with reasonable diligence to deliver notice but has been unable to do so."

And when so amended the bill do pass. Amendments adopted. Report adopted.

Exhibit G**

Excerpt from Transcript of Remarks by
Minnesota State Sen. Gene Waldorf
at Minnesota Senate Session Regarding Senate File 287
(May 6, 1981)

- CHAIR: Senator Waldorf has moved that when this Committee do arise that Senate File 287 be recommended to pass. Senator Waldorf.
- WALDORF: On page 1 of the bill, the first new language is in subdivision 2, which deals with the notification requirements. It says "no abortion operation shall be performed on a minor—upon a minor or upon a woman for whom a guardian or conservator has been appointed without a 48 hour waiting period after written notice has been provided." And then it [sic] Clause A it deals with the unmarried woman who is living with their [sic] parents. Subclause B deals with [a] pregnant woman who is unmarried and not living with her parent. And then finally, an alternate form of delivery, rather than the personal delivery by the physician or his [sic] assistant. The language on lines 10-12 offer the opportunity to make notice by way of certified mail. Subdivision 3 defines a parent for purposes of this section. "Parent means both parents of the pregnant minor or both parents of punitive [sic] father." The punitive [sic] father, for those of you that don't know what that means, punitive [sic] means presumed or alleged father. That language was added by amendment in committee and I intend to remove that language with

** A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Petitioners.

one of my amendments. And it goes on to describe those who should be notified.

Subdivision 4 is an important one in that it provides some exclusions from this notification requirement. Those exclusions are: if the attending physician certifies that the woman—in the pregnant woman's medical record that the abortion is necessary to prevent her death and there is insufficient time for providing notice; if the abortion has already been authorized in writing by the parent; and finally, if the pregnant minor woman declares that she is a victim of sexual abuse, neglect or physical abuse as defined in our statutes, then notice does not have to be given, but in that particular section of law there is a very specific and prescribed requirement that the Welfare Department or two other agencies be notified that the declaration has been made so that they can bring into play the normal investigation which goes on in all cases of alleged child abuse. But in that case the abortion could be performed without notification.

Finally, subdivision 5 is a penalty and that penalty is the criminal penalty of a misdemeanor that would be charged against the person who was not—I mean who should have notified, and that would be the physician who performed the abortion who did not make an attempt or proper attempt to notify the parent and also includes civil action by the parent who was wrongfully denied notification. And finally, there is a—the last part to that subdivision deals with the definition of what is a reasonable attempt at notification and also what standard may be used for the information provided to the doctor who is going to perform abortion by the minor. In the case where the minor would present some false information and it was reasonably prudent on

his [sic] part to accept that information then, of course, he would not probably be found guilty by the court.

Mr. Chairman, that is the extent of the bill as it exists now.

* * *

WALDORF: This bill does not deal with consent, but I think that the legal staff who have looked at this agrees that, should the question come to the courts of a minor who is living at home but may be considered mature if she objected to the notification provisions, that there may have to be some sort of court override, or process by which she can appeal to the court that her parents should not be notified. And that's also in the bill.

Those are the three major provisions in the bill. There are some other smaller provisions which relate to delivery, but that's the effect of this amendment. I urge your support and, Mr. Chairman, I think I may as well call for a roll call vote on this.

CHAIR: The chair recognizes Sen. Bergland.

BERGLAND: Mr. Chairman and Sen. W. It really would have been a lot easier to follow this if you have had a strick [sic] everything amendment, but since we don't I have some questions. Are you maintaining in Subd. 3, the definition of "parent" meaning both parents of the pregnant woman?

CHAIR: Sen. W.

WALDORF: Mr. Chairman, Sen. Bergland, is that one the bill?

BERGLAND: Yeah, it's in the bill, on page 2. Under definition of parent.

WALDORF: Mr. Chairman, it means both parents, if they're both living. One parent if only one is living and the—or if the second one cannot be located through reasonably diligent effort. So in the case of a divorce the parents in two different locations, an attempt should be made to locate the second parent but only with reasonable diligence.

CHAIR: Sen. B.

BERGLAND: Mr. Chairman, Sen. W., then if the pregnant woman agrees to have one of her parents notified but not both of them, then your remedy is that she would be going to court, is that what the amendment does?

CHAIR: Sen. W.

WALDORF: Mr. Chairman, I believe that would be the case, yes.

BERGLAND: And, Mr. Chairman and Sen. W., the reason you're offering this amendment is because you believe it will make the bill constitutional? that what you said?

CHAIR: Sen. W.

WALDORF: Mr. Chairman and Sen. B., that's what we're trying to do is to make the bill constitutional. I am not aware of any court decisions, supreme court [sic] decisions that would not give status to the natural parent who is divorced.